(8)

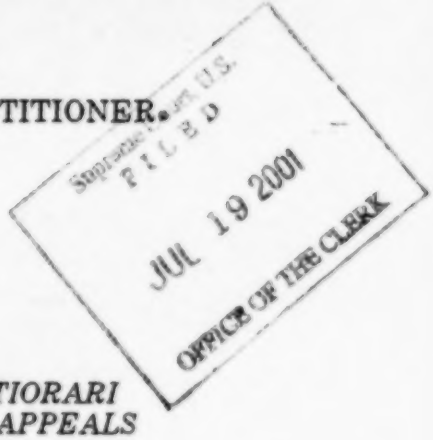
No. 00-1519

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,

v.

RALPH ARVIZU



ON ~~PETITION FOR A WRIT~~ OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: APR. 2, 2001
CERTIORARI GRANTED: JUNE 4, 2001

191 pp

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA (TUCSON)

No. 98-CR-157-ALL

UNITED STATES OF AMERICA, ET AL., PLAINTIFF

v.

ARVIZU, DEFENDANT

[Filed: Feb. 11, 1998]

DOCKET ENTRIES

DATE	DOCKET NUMBER	DOCKET PROCEEDINGS
1/19/98	--	DEFENDANT Ralph R Arvizu arrested. Ralph R. Arvizu (1) count(s) cmp [4:98-m -50] (mrp) [Entry date 01/26/98]
1/20/98	1	COMPLAINT filed as to Ralph R Arvizu [4:98-m -50] (mrp) [Entry date 01/26/98]

DATE	DOCKET NUMBER	DOCKET PROCEEDINGS
		* * * * *
1/21/98	5	ORDER by Mag Judge Raymond T. Terlizzi setting conditions of release; PAB bond set for Ralph R Arvizu in the amount of $ 7500 [4:98-m -50] (mrp) [Entry date 01/26/98]
		* * * * *
2/11/98	9	INDICTMENT by USA attorney Christina Marie Cabanillas. Counts filed against Ralph R Arvizu (1) count(s) 1; Arraignment set for 11:00 2/19/98 for Ralph R Arvizu before Mag Judge James C. Carruth (br) [Entry date 02/11/98]
2/17/98	10	WAIVER of Personal Appearance at Arraignment and Entry of Plea of Not Guilty by Ralph R Arvizu (br) [Entry date 02/18/98]
		* * * * *

DATE	DOCKET NUMBER	DOCKET PROCEEDINGS
4/17/98	17	MOTION to suppress evidence based on lack of reasonable suspicion to stop [17-1] by Ralph R Arvizu (br) [Entry date 04/20/98]
		* * * * *
12/7/98	32	(FILED: 12/8/98) MINUTES: before Judge Frank R. Zapata Ct Rptr: D. Davenport denying motion to suppress evidence based on lack of reasonable suspicion to stop [17-1], trial date of 12/29/98 is affirmed [cc: frz usa cnsl psa [32-1] (br) [Entry date 12/09/98]
		* * * * *
1/13/99	38	(FILED: 1/13/99) MINUTES: before Mag Judge Glenda E. Edmonds Ralph R Arvizu (1) enters a plea of guilty to Indictment ; sentencing set for 1:30 4/2/99 for Ralph R Arvizu [cc: usa po psa cnsl frz [38-3] (br) [Entry date 01/19/99]

DATE	DOCKET NUMBER	DOCKET PROCEEDINGS
1/13/99	39	PLEA agreement filed as to Ralph R Arvizu (br) [Entry date 01/19/99]
1/20/99	40	ORDER by Mag Judge Glenda E. Edmonds on 1/13/99 of the Findings and Recommendation upon a plea of guilty as to Ralph R Arvizu and District Court Judge Zapata's acceptance of plea of guilty. (br) [Entry date 01/25/99]
		* * * * *
4/22/99	47	(FILED: 4/28/99) MINUTES: before Judge Warren W. Eginton Ct Rptr: B. Harper ; sentencing held re dft Arvizu [cc: USA PO PT Cnsl FRZ] [47-2] (bsw) [Entry date 04/28/99]
		* * * * *

DATE	DOCKET NUMBER	DOCKET PROCEEDINGS
4/22/99	50	JUDGMENT and Commitment issued as to Ralph R Arvizu sentencing for Ralph R Arvizu (1) count(s) 1. 10 mos imprisonment (5 mos in a community corrections center & 5 mos as home confinement w/electronic monitoring); 36 mos sup rel; fine waived; credit for time served; voluntary surrender program; $100 s/a; Case closed; ordered by Judge Warren W. Eginton (bsw) [Entry date 04/28/99]
4/28/99	51	NOTICE OF APPEAL by Ralph R Arvizu from District Court, re sentencing and judgement, and order of 12/7/98 denying motion to suppress evidence (cc: 9CCA/All Counsel) (br) [Entry date 04/29/99]
		* * * * *

DATE	DOCKET NUMBER	DOCKET PROCEEDINGS
1/2/01	59	(FILED: 1/3/01) MINUTES: before Judge Frank R. Zapata Ct Rptr: D. Davenport status hearing re mandate w/9CCA, the mandate having been returned from 9th Circuit Court of Appeals reversing and remanding court's ruling on motion to suppress; trial set for 9:00 2/20/01 for Ralph Arvizu; status hrg held [cc: usa po psa cnsl [59-2] (br) [Entry date 01/03/01]
		* * * * *
2/20/01	61	(FILED: 2/21/01) MINUTES: before Judge Frank R. Zapata denying motion for dismissal pursuant to the speedy trial [0-0], denying motion dismissing defendant [0-0], granting motion to continue trial date to permit the filing of petition for certiorari [60-1]; trial set for 9:00 4/3/01 for Ralph R Arvizu, excludable delay XT started 2/20/01 terminating 4/3/01 [cc: usa po psa cnsl [61-3] (br) [Entry date 02/21/01]

DATE	DOCKET NUMBER	DOCKET PROCEEDINGS
3/20/01	62	MOTION to continue trial date until US Supreme Court issues final decision [62-1] by USA as to Ralph R Arvizu (br) [Entry date 03/21/01]
3/20/01	63	ORDER by Judge Frank R. Zapata granting motion to continue trial date until US Supreme Court issues final decision as to Ralph Arvizu [62-1] (br) [Entry date 03/21/01]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-10229

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RALPH ARVIZU, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
5/5/99	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C. on 4/29/99; setting schedule as follows: transcript shall be ordered by 5/19/99 for Ralph Arvizu; transcript shall be filed by 6/21/99; appellants' briefs, excerpts due by 8/2/99 for Ralph Arvizu; appellees' brief due 9/2/99 for USA; appellants' reply brief due by 9/16/99 for Ralph Arvizu. (RT required: y) (Sentence imp 10 mos) [99-10229] (kc) [99-10229]
	* * * * *
7/7/00	FILED OPINION: REVERSED AND REMANDED. (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Henry A. Politz; Stephen R.

DATE	PROCEEDINGS
	REINHARDT, author; Michael D. HAWKINS) FILED AND ENTERED JUDGMENT. [99-10229] (rc) [99-10229]
	* * * * *
8/21/00	[3975970] Filed original and 50 copies aple's petition for rehearing with suggestion for rehearing en banc of 18-pgs; serve[d o]n 8/19/00. (PANEL AND ALL ACTIVE JUDGES) [99-10229] (rc) [99-10229]
	* * * * *
9/14/00	Filed order (Henry A. Politz, Stephen R. REINHARDT, Michael D. HAWKINS) aplt is ordered to file a response to the petition for rehearing with petition for rehearing en banc within twenty-one (21) days from the date of this order. [99-10229] (rc) [99-10229]
	* * * * *
12/1/00	Filed order and amended opinion (Judges Henry A. Politz, Stephen R. REINHARDT, Michael D. HAWKINS) (Orig. opinion REVERSED AND REMANDED. The petition for rehearing and petitio[n] for rehearing en banc are DENIED.id: [3945888-1]) [99-10229] (tm) [99-10229]

DATE	PROCEEDINGS
12/12/00	MANDATE ISSUED [99-10229] (tm) [99-10229]
12/29/00	Filed USA motion to recall and stay the mandate pending petition for writ of cert. (PANEL) [99-10229] served on 12/28/00 [4085702] (wp) [99-10229]
1/9/01	Filed Appellant's response to motion to recall and stay mandate pending petition for writ of cert. served on 1/5/01 (PANEL) [99-10229] (wp) [99-10229]
1/11/01	Filed Order (Henry A. Politz, Stephen R. REINHARDT, Michael D. HAWKINS) The Motion to Recall and Stay Mandate Pending for Writ of Certiorari is DENIED. [99-10229] (af) [99-10229]

* * * * *

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CR-98-157-01-TUC-FRZ

UNITED STATES OF AMERICA

v.

RALPH R. ARVIZU

* * * * *

[Filed: Apr. 28, 1999]

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT ENTERED A PLEA OF:

XX guilty __ nolo contendre: as to the Indictment

THERE WAS A:

XX finding __ verdict: of guilty as to the Indictment

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: violating Title 21 United States Code Section 841(a)(1) and (b)(1)(C), Possession with Intent to Distribute Marijuana, a Class C felony, as charged in the Indictment filed herein.

IT IS THE JUDGMENT OF THIS COURT THAT: the defendant is hereby committed to the custody of the Bureau of Prisons for imprisonment for a period of **TEN (10) MONTHS, FIVE (5) MONTHS TO BE SERVED IN A COMMUNITY CORRECTIONS CENTER, FIVE (5) MONTHS TO BE SERVED AS HOME CONFINEMENT WITH ELECTRONIC MONITORING.**

In addition, the defendant shall serve a **THIRTY-SIX (36) MONTH** term of supervised release to commence upon the defendant's release from confinement and as provided by the law. Within 72 hours of release from confinement, the defendant shall report in person to the U.S. Probation Office in the district to which he is released.

In addition to the general terms of supervised release, the following conditions are imposed: **1.** The defendant shall participate as instructed by the probation officer in a program of substance abuse treatment which may include testing for substance abuse. The defendant shall contribute to the cost of treatment in an amount to be determined by the probation officer. **2.** The defendant shall submit to search of person, property, vehicles, business, and residence to be conducted in a reasonable manner and at a reasonable time by, or at the direction of, the probation officer.

The Court finds the defendant does not have the ability to pay and orders the fine **WAIVED**.

IT IS FURTHER ORDERED the defendant is to receive credit for **TIME SERVED**.

The defendant is granted leave to voluntarily surrender under the "Voluntary Surrender Program." Defendant is directed to surrender to the designated institution as directed by the Bureau of Prisons.

* * * * *

IT IS FURTHER ORDERED that the defendant shall pay an assessment of $100.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) the Indictment as follows:

TOTAL ASSESSMENT $100.00
SPECIAL ASSESSMENT TO BE PAID IMMEDIATELY OR AS DIRECTED BY THE COURT

* * * * *

April 22, 1999
Date of Imposition of Sentence

/s/ [Illegible]
Signature of Judicial Officer

Warren W. Eginton, Senior U.S. District Judge
Name and Title of Judicial Officer

April 26, 1999
Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

(Tucson-Globe Division) **CRIMINAL MINUTES**

98 / 157/ 1 Date: December 7, 1998
Yr Case No. Dft#

HONORABLE FRANK R. ZAPATA

USA v. ARVIZU RALPH
Last Name First Name Middle Name

DEFENDANT: XX Present XX Released
__ Custody __ Writ

Deputy
Clerk: Virginia Abeyta Crt Rptr: Dianne Davenport

U. S. Atty: Chris Cabanillas Dft Atty: Victoria Brambl
__pres__ appt. ___ret'd

Intrptr:_____

__ Dft not appearing, on mot of US Atty, order bond revoked/forfeited and B/W issued, dft to be held without bail

PROCEEDINGS: XX Open Court __Chambers __Other

HEARING PENDING MOTIONS: Counsel make statements to the Court. Witnesses Clinton Stoddard, Victor Chacon, Ralph Arvizu, Julie Reyes, sworn and examined. Exhibits marked and admitted. Returned to counsel.

Pursuant to Findings on the record,

ORDERED Motion to Suppress Evidence is DENIED.

Trial date of December 29, 1998 is affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
Tucson, Arizona

CR 98-157-TUC-FRZ

UNITED STATES OF AMERICA, PLAINTIFF

v.

RALPH ARVIZU, DEFENDANT

Tucson, Arizona
December 7, 1998

MOTIONS HEARING

BEFORE: HONORABLE FRANK R. ZAPATA
UNITED STATES DISTRICT COURT JUDGE
55 E. BROADWAY
TUCSON, ARIZONA 85701

A P P E A R A N C E S

FOR THE GOVERNMENT: MS. CHRIS CABANILLAS, Assistant United States Attorney.

FOR THE DEFENDANT: MS. VICTORIA BRAMBL, Assistant Federal Public Defender.

* * * * *

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[3]

P R O C E E D I N G S

(Call to order of court, 9:50 a.m.)

THE CLERK: In criminal matter 98-157, the United States of America versus Ralph Arvizu, on for hearing pending motions.

MS. CABANILLAS: Good morning. Chris Cabanillas for the United States.

THE COURT: Good morning, Ms. Cabanillas.

MS. BRAMBL: Victoria Brambl for Mr. Arvizu.

THE COURT: Good morning, Ms. Brambl.

This is the time set for the motions hearing in this case.

The government ready to proceed?

MS. CABANILLAS: Yes, Your Honor.

THE COURT: Defense ready to proceed?

MS. BRAMBL: Yes, Your Honor.

MS. CABANILLAS: The government would call Agent Clinton Stoddard, United States Border Patrol.

CLINTON STODDARD, GOVERNMENT WITNESS, SWORN

THE CLERK: Please state your full name and spell the last for the record.

THE WITNESS: My name is Clinton Eric Stoddard, S-t-o-d-d-a-r-d.

[4]

DIRECT EXAMINATION

BY MS. CABANILLAS:

Q. Agent Stoddard, where do you work?

A. I work for the United States Border Patrol.

Q. And how long have you worked for the United States Border Patrol?

A. Over two and a half years.

Q. And where are you primarily assigned at this point?

A. The Douglas, Arizona station.

Q. How long have you worked in the Douglas area?

A. For over two years.

Q. And what are your duties as a border patrol agent in the Douglas area?

A. Our primary duties are immigration laws and we also have secondary duties of custom, tariff, and Title 21 duties.

Q. As part of your duties, are you involved in the interdiction of illegal aliens and narcotics?

A. That is correct.

Q. Have you been trained at all about the particular patterns and modes of certain illegal alien smugglers or drug dealers in the Douglas area?

A. Yes.

Q. As part of your duties as a border patrol agent in that area, do you stop vehicles that could possibly contain illegal aliens or drugs?

A. Yes.

Q. And have you received any training about how to detect whether or not certain vehicles that are traveling on the road may contain illegal aliens or drugs.

A. Yes.

Q. And what exactly have you learned or what kind of training have you either received or given?

A. It starts back at the academy. You go through approximately five months of training and part of that training is how to detect when there are people—through their behavior and actions when they are transporting illegal aliens or illegal narcotics.

And then once you arrive to the station, for the first several months you are put with a journeyman agent which is a more senior agent. They take you through and show you the local routine for the local smugglers, routes of travel, and show the ropes and what happens in that particular area. I was shown the Douglas area.

Once you have enough experience, then you go on and you train others on the experiences and the things that you have learned.

Q. Have you given training then?

A. Yes.

Q. Have you received that level then?

A. Yes.

[6]

Q. How often would you say you have trained other agents in this area?

A. When we are working in the field, on a daily basis often we are placed with training agents and we show them basically the whole area of operations.

Q. What are border patrol checkpoints?

A. Border patrol checkpoint is where we stop all the traffic that goes through that area and we are attempting to stop the undocumented illegal aliens from going further north into the United States.

Q. Have you worked yourself at a border patrol checkpoint?

A. Yes.

Q. Have you worked at checkpoints not only near the border but away from the border?

A. Yes.

Q. And what are roving patrols?

A. Roving patrol is basically when you are in a marked unit and you are looking for traffic driving by that you suspect to be involved in illegal activity such as smuggling.

Q. Have you ever been on roving patrol?

A. Several times.

Q. When you are on roving patrol is the fact that a checkpoint may be operational that day maybe significant to you as you are doing your duties?

A. Yes.

[7]

Q. Why?

A. When a checkpoint is operational the illegal activity that is conducted throughout the day usually tries to evade the checkpoint one way or another, tries to circumvent it, either through walking around the checkpoint or driving around the checkpoint. So when you are roving patrol, you are looking for both of that type of activity.

Q. When you say "driving around the checkpoint," what do you mean? Where do the vehicles usually go?

A. Usually take the back roads.

Q. When you say "back roads," what do you mean?

A. Unpaved roads that don't run right through the checkpoint where they can't be interviewed and questioned by border patrol agents.

Q. When you are on roving patrol then, what are your duties exactly?

A. Our duties on roving patrol are to try to detect illegal activity outside the checkpoint, try to detect suspected smugglers that circumvent the checkpoint.

Q. You stated you have been on roving patrol before several times; I believe is what you said. Can you give us an estimation how many times you have stopped vehicles that have contained illegal aliens or drugs?

A. Be [*sic*] my estimation over 50.

Q. Were you working on January 19, 1998 at approximately [8] 2:15 p.m.?

A. Yes, I was.

Q. Where were you?

A. I was at the border patrol checkpoint located on Highway 191.

MS. CABANILLAS: Your Honor, at this point I will use some exhibits. Can I set up the exhibit?

THE COURT: Yes, you may.

MS. CABANILLAS: May I approach with a copy of the exhibit so Your Honor can see it more clearly than from a distance?

THE COURT: Yes, you may.

BY MS. CABANILLAS:

Q. I'm showing you what has been marked as Exhibit 41. Do you recognize that exhibit?

A. Yes, I do.

Q. What is that?

A. That is a general map of the area from Douglas up to the 191 checkpoint and some of the area that is east of it.

Q. I'm showing you what has been marked Exhibit 40. Do you recognize that?

A. Yes. That is the same map only a smaller version.

Q. Is that an 8 1/2 by 11 version of Exhibit 41?

A. That is correct.

Q. You stated that you were—I believe you stated where [9] you were working on January 19 at approximately 2:15. Where was that?

A. At the checkpoint at 191.

Q. The checkpoint at I-91- --

MS. CABANILLAS: Do we have a pointer by chance perhaps?

BY MS. CABANILLAS:

Q. Using the pointer can you give us an indication of where you were working on I-191?

A. The 191 checkpoint is set up at the intersection of 191 and Rucker Canyon Road, right there.

Q. I-191, can you give us, by the use of your pointer, an indication of where 191 runs north to south?

A. Yes. 191 runs north along this line right here.

Q. Does it go along that diagonal line or along the straight up-and-down line? Feel free to take a look at the exhibit.

A. It runs along the diagonal line right here.

Q. When you say you were working the checkpoint at I-91 and—what was the cross street?

A. I-91 at Rucker Canyon.

Q. Do you think you can use a pen and write a number 1 and put a circle around it on Exhibits 40 and 41 to indicate where the checkpoint was?

A. Sure. Number 1?

Q. Number 1 with a circle around it where your checkpoint [10] was.

Now, how far north of the border is that checkpoint where you put the number 1?

A. It's approximately 30 miles or so.

Q. 30 miles. And approximately 2:15 p.m. did anything happen that drew your attention that day?

A. Yes. Via Douglas radio it was reported through an intrusion device indicating that a northbound vehicle had gone off.

Q. When you say "intrusion device," what do you mean?

A. It is a sensor basically stating that there is vehicular activity on a particular route of travel.

Q. Using the pointer again on Exhibit—what is the large exhibit, 41?

A. 41.

Q. Using the pointer on Exhibit 41, can you indicate for the court—when you state that the sensor activity indicated a northbound route of travel, without giving away obviously any confidential information, give us the general area of where the sensor activity was indicated.

A. Yes. It's going to be between Hunt Canyon and Rucker Canyon on Leslie Canyon Road which runs north along here.

Q. When you say right "along here," are you indicating north to south route of Leslie Canyon?

A. That is correct.

[11]

Q. And is Leslie Canyon Road indicated in writing on Exhibit 41 and Exhibit 40 down below?

A. Yes.

Q. So Leslie Canyon runs how far north and then where does it end?

A. It runs as far north as when it meets Rucker Canyon and then it ends.

Q. That is where it ends north. Where does it end south?

A. South ends at Highway 80.

Q. Is that in the Douglas area?

A. That's correct.

Q. So would that be a north-to-south route—or north-to-south route for somebody leaving from Douglas?

A. Yes.

Q. When that sensor activity went off, was that significant to you?

A. Yes, it was.

Q. Why is that?

A. Part of the significance was the time of day. We have a shift change at about that time. Agents begin heading back to the checkpoint which leaves the area wide open and alien smugglers do extensive scouting and that is the time of day they seem to do the most smuggling is when the agents are en route back to the checkpoint.

Q. As far as this road is concerned—and you stated it was [12] Leslie Canyon heading north—is there any significance about that route particularly?

A. That route is very rarely traveled. It's traveled mostly by ranchers and forest service personnel. Border patrol agents patrol occasionally. So it is not—it is a very desolate area.

Q. What did that tell you in relation to the fact that the checkpoint was operational that day?

A. That indicated that there was the probability of a vehicle circumventing the checkpoint using that route of travel.

Q. When you hear the sensor activity then, what did you do—actually, before you did anything, did anybody tell you anything with relation to that sensor activity in that particular area?

A. Yes. A work mate of mine, another border patrol agent that was working the checkpoint with me, had reminded me of an apprehension under similar circumstances that he had. That same sensor had gone off some time before, several weeks, maybe a month before that. He had apprehended a van, a minivan, using the same route of travel, and he witnessed them throwing bundles of marijuana out the door.

Q. Did you say he apprehended that van, the people in that van?

A. Yeah. He continued north and apprehended the van.

[13]

Q. When you state where this area was, can you give us an explanation or a brief description of this area where the sensor activity went off?

A. This particular area here?

Q. What kind of an area is it?

A. Maintained dirt road. As I said before, it is very desolate, very rarely traveled. You can sit on that road for hours and not see a vehicle go by.

Q. After you received this information from the other agent, what did you do then?

A. I responded in that direction to be able to check out anything that was going on and any activity in case that vehicle continued in our area of responsibility which would have turned west on Rucker Canyon then there is another sensor that would have indicated that.

Q. If somebody is heading—actually, strike that. The sensor activity indicated the direction the vehicle was taking. Is that what you said?

A. Yes.

Q. What direction was that?

A. Northbound.

Q. So you headed what direction on Rucker to try to intercept it?

A. I began driving eastbound on Rucker Canyon.

Q. With your pointer can you indicate where Rucker starts [14] and ends east and westbound?

A. I started right here.

Q. Which is at intersection?

A. Intersection 191 and Rucker. I drove eastbound.

Q. Then Rucker Canyon—if you just use your pointer to show us where Rucker Canyon leads all the way across.

A. Rucker Canyon leads to Kuykendall and then it continues past Mountain Queen and up to where it intersects with Leslie Canyon and continues on eastbound to Highway 80.

Q. When you say "eastbound," is it going into a particular area? I see some blocks over there. What is that?

A. This is a very heavy forest area.

Q. Is that a national forest?

A. Yes.

Q. So when you started traveling then eastbound on Rucker, what happened?

A. As I was traveling eastbound on Rucker, when I got up in this area, another report of sensor activity came over the radio which indicated that the vehicle began heading westbound on Rucker from Leslie Canyon. It started westbound on Rucker Canyon.

Q. So correct me here. The vehicle then, rather than taking a right turn and heading east into the forest, it turned, is that what that would indicate to you, that it turned to head east towards—

[15]

A. Yes.

Q. Was that significant?

A. That was very significant because this is a notorious route of travel that the aliens and narcotics smugglers have been using to circumvent the checkpoint.

Q. When you say "circumvent the checkpoint," what route would—someone who is trying to circumvent that checkpoint you had up that day, what route would that person take to do so successfully?

A. Most common route of travel is to continue westbound on Rucker and go northbound on Kuykendall Cutoff to Highway 191.

Q. Would they have been able to access Tucson or Phoenix?

A. Yes. From that point on there is very limited patrol, and once they get north of the checkpoint, it is very difficult for us to apprehend them.

Q. So when you heard—or you received information that the second sensor went off, where were you?

A. I was continuing eastbound on Rucker Canyon when the second sensor activity was reported.

Q. Did you indicate whether Rucker Road was paved or unpaved?

A. Rucker Road is unpaved.

Q. Is that a dirt road?

A. That is a dirt road. All the roads in this area are unpaved.
[16]

Q. Now, the other road, Kuykendall Road, what kind of a road is that?

A. Kuykendall is also an unpaved road.

Q. When you started heading east then on Rucker, did you happen to see another vehicle?

A. Yes. Once I passed Kuykendall, I continued east. I saw a dust trail and a vehicle approaching my location.

Q. Before we get to that point, when you indicate that the entrance from the eastbound goes into the forest on eastbound Rucker, are there any picnic grounds and stuff in that area of the forest?

A. Yes. East of the intersection of Rucker and Leslie I believe there is picnic grounds up in that area.

Q. When you encountered the vehicle then, how far away were you when you first saw it?

A. When I first saw the vehicle, I first saw the dust trail probably a half mile or so.

Q. Had you encountered any other vehicles before you saw this particular vehicle?

A. No. That was the only vehicle.

Q. Were you alone in your vehicle, by the way?

A. Yes.

Q. From the timing of when the sensors were tripped, the first and second one, when you saw that vehicle, did you believe this was the vehicle that had tripped the sensors?

[17]

A. Yes. The timing was right about.

Q. When you saw that vehicle and you became visible to the other vehicle, did you see the vehicle do anything?

A. Yeah. I pulled off to the side of the road as I saw the dust trail so I could see it approach. I saw the vehicle. It appeared to slow down dramatically.

Q. When you say "dramatically," what do you mean?

A. Probably reduced its speed to about half or so.

Q. You stated that you pulled off. What do you mean that you did?

A. I pulled off to the side of the road so I was stopped so I could obtain a good look when that vehicle drove by.

Q. Did you pull off along the shoulder?

A. Yeah, on the right side, a little area I pulled off.

Q. Can you put a 2 on that exhibit—on Exhibit 41 and 40 and put a circle around it where you pulled off?

A. I don't know the exact location on this. I will put it in an approximate location.

Q. That's fine.

Now, you say you pulled off. Were you facing the oncoming car then?

A. Yeah. I was facing the oncoming car slightly at a slant.

Q. And what did you see?

A. As the vehicle approached me, I saw what appeared to be five occupants. One male driver and the driver was rigid. He was kind of stiff. [18] His—both hands were on the steering wheel, an odd posture, as if he was nervous once he saw me.

Q. What kind of car was this or vehicle?

A. It was a Toyota minivan.

Q. Is the fact that it was a minivan significant to you?

A. Yes, very significant.

Q. Why is that?

A. It's a very commonly used vehicle to smuggle both illegal aliens and narcotics. I've had experience with both and so have other agents. In fact, the agent that relayed his story to me, they had also used a minivan in that same area.

Q. When you say in your experience, then have you personally been involved in the seizures of drugs and aliens from minivans?

A. Both drugs and aliens, correct.

Q. You say you saw five occupants, or a driver that was rigid. How did you describe the driver?

A. Very stiff, very rigid posture. Both hands were on the steering wheel. He appeared to be in a tight manner. He did not look in my direction, as if he was ignoring me, trying to pretend I wasn't there, or something to that effect. There was a passenger that

seemed fairly uptight as well. Then there was three children in the back.

Q. When you say "the back," I'm not familiar with minivans. How many seats are in a minivan?
[19]
A. If I recall there was two back seats.

Q. All right. Where were the children?

A. There was one child in the middle seat and then there was two children in the very back seat.

Q. Did you notice anything with relation to the two children in the back seat that caught your attention?

A. Yes, I did. The children in the back seat had an odd posture as well. Their knees were elevated kind of high as if their feet were propped up on something, but it didn't look like they were propped up on their own seat. It was in the regular well area but in a higher location. You could see the knees at the seat level.

Q. What did that indicate?

A. There was some type of cargo on the floor in their foot area, something they were propped up on.

Q. And what did you do then after you saw the car pass your location and made those observations?

A. At that point I wanted to get a closer look at it so I pulled off and I began to follow the vehicle.

Q. And when you're following the vehicle, it's heading which direction, if you can use the pointer on Exhibit 41?

A. The vehicle is continuing in a westbound direction on Rucker Canyon.

Q. Then that is leading towards the Kuykendall Road Cutoff then?
[20]
A. Correct.

Q. You are following it?

A. That is correct.

Q. Did the kids do anything when you were following the car that attracted your attention?

A. Yes. Shortly after I began following the vehicle, the kids began to wave to me. Looked like all three of the kids were waving. It wasn't in a normal pattern. It looked like they were instructed to do so. They kind of stuck their hands up and began waving to me like this.

Q. Were they looking at you?

A. No, they weren't looking at me.

Q. Did they continue to face forward then?

A. Correct.

Q. Were they waving at you or forward?

A. It looked like they were waving forward.

Q. How long did they continue this particular gesture?

A. They did it off and on for the entire time I was following them. Probably four minutes or maybe five minutes.

Q. Four or five minutes they are continuing this waving?

A. Yeah, off and on.

Q. What happened then after you saw this?

A. Well, the driver signified he was going to turn right using his signal, his right-turn signal. It looked like he signaled several hundred feet before Kuykendall Road to turn [21] right, which would be the last turnoff to circumvent the checkpoint successfully.

Then at one point his turn signal was clicked back off so I thought maybe he was going to go straight. Right as he approached the intersection, he put it back up and made an abrupt turn right.

Q. Turned north onto Kuykendall?

A. Went north on Kuykendall.

Q. The Kuykendall Road itself, is that different as far as terrain is concerned between the Rucker Canyon Road?

A. Rucker Canyon Road is maintained whereas Kuykendall is maintained occasionally, but I don't think it is maintained as often. There are a lot of washouts when it rains. The roads—it can be driven on by like a sedan or a van, but it is not normal traffic.

Q. Do you as border patrol agents take sedans or vans in that area?

A. No. It's against our regulation because the only thing we are allowed to take out there is a 4X4.

Q. 4X4?

A. 4X4 vehicle. That's correct.

Q. The fact that the van took the abrupt turn on Kuykendall Road, is that significant to you?

A. That is significant.

Q. Why?
[22]

A. Because of the type of vehicle, number one. It is not normal. I didn't recognize the vehicle. And we spend enough time out there where we kind of know what vehicles are normal out there, the normal traffic, which is ranchers and so forth. Thirdly, because that is the final route of travel to circumvent the checkpoint.

Q. And then after the vehicle made that abrupt turn right, did you follow it?

A. Yes, I did.

Q. Did you happen to run the registration or anything on this car?

A. Yes, I ran the registration check through the radio.

Q. What results did you get?

A. It came back to the 400 block of Douglas, Arizona.

Q. 400 block of Douglas?

A. Uh-huh.

Q. Any particular streets or roads?

A. 4th Street.

Q. What was that as far as—was that significant to you?

A. That is very significant.

Q. Why is that?

A. That area is the—it is one of the most notorious areas of smuggling in the Douglas area.

Q. What kind of smuggling?

A. Both alien and narcotic smuggling. We have several of [23] the locations on that street that are listed as lookouts where they stage aliens and narcotics before transporting them further north.

Q. How far north of the border is that particular street that you were talking about?

A. Four blocks.

Q. Four blocks north of the U.S.-Mexico border?

A. That's correct.

Q. And what did you do after that, after that registration came back?

A. After the registration came back, I decided to perform a vehicle stop on the vehicle.

Q. Can you put a 3 with a circle around it at the point that you did the stop of the vehicle on Exhibits 40 and 41?

A. Sure. Again, I will approximate because I don't know exactly on this map where the stop was.

Q. That's fine.

MS. CABANILLAS: Your Honor, I move to admit Exhibits 40 and 41 at this point.

THE COURT: Any objection?

MS. BRAMBL: No, Your Honor, but I would ask to approach so I can look.

THE COURT: Yes, you may.

Point out where the marks are again.

THE WITNESS: Sure.
[24]

MS. CABANILLAS: Were those admitted, Your Honor?

THE COURT: Yes, shall be admitted.

BY MS. CABANILLAS:

Q. After you stopped the vehicle, what did you do?

A. Once I stopped the vehicle, I approached from the driver's side.

Q. And did you happen to look inside the vehicle from the outside when you were walking by?

A. Yes. As I was walking by, I looked inside the vehicle where the children were sitting in the back and their legs were high, as it looked when they passed by. It looked as though they were propped up.

Q. Could you see what that something was from the outside?

A. I couldn't tell what it was. It appeared to be some type of cargo.

Q. Did you approach then the driver's side?

A. Yes. I approached from the rear of the vehicle. I approached the driver's side.

Q. Without telling us what you said, did you have a conversation with the driver of the car?

A. Yes.

Q. Did you eventually learn what the driver's name was?

A. Yes.

Q. What was that name?

A. Ralph Arvizu.

[25]

Q. Do you see that individual in the courtroom today?

A. Yes, I do.

Q. Can you please point him out for the court?

A. Sure. Sitting right there.

Q. When you say "right there," can you describe what he's wearing?

A. A striped shirt, glasses, black hair.

MS. CABANILLAS: May the record reflect identification, Your Honor?

THE COURT: It may.

BY MS. CABANILLAS:

Q. Now, did you—you said you spoke to the driver. Can you tell us what you said and what he said briefly?

A. Yes. As I approached the vehicle, he seemed kind of excited, which is one of the signs that we are taught to look for. He kind of stuck his head back out and looked at me and said, "Good afternoon, Officer. How are you doing?" in a real excited tone of voice.

Q. What does that indicate to you?

A. Indicates he's very nervous, that he may be doing something wrong. As I approached I identified myself as a United States Border Patrol agent. I asked him where he was coming from and heading to.

Q. What did he say to you?

A. He stated that he was coming from Douglas and he was [26] heading to a park. He kind of stumbled over the name. And he couldn't recall the name of the park he was going to.

Q. Did you ask him where he is from?

A. Yeah, I asked him where he was from. He said he was born and raised in Douglas, Arizona.

Q. So the fact he couldn't provide a name for the area where he was going, was that significant to you?

A. That was significant because—

Q. Why is that?

A. —in my own opinion, when I am heading to a certain park or location, I usually know exactly where I am going.
Q. Did he indicate that he didn't know the name, period?

A. That maybe he forgot the name is the impression I got.

Q. Now, did he indicate he was going to a park? Is that what you said?

A. Yes.

Q. Did he say the forest or the park? Do you remember?

A. I don't recall.

Q. Did you notice—first, what language were you speaking here?

A. He initiated the conversation in the English language. He spoke it perfectly unbroken so I continued the conversation in English.

Q. And did you notice anything with regard to his mannerisms that you found significant?
[27]
A. Yes. He seemed very nervous. He didn't know what to do with the hands. They were shaking. I looked at his forehead and he had some sweat on his

forehead which also indicates that he may be nervous. It wasn't very hot out.

Q. After you spoke to him then about where he was going, what else occurred? Did you say anything else to him?

A. Can I refer to my report?

Q. Sure.

A. Yeah. After we talked about where he was from and where he was going to, I asked him what his immigration status was. He stated, you know, real excited—and, actually, at this point he seemed like he was kind of telling the truth. It was the only time throughout the thing it didn't seem like he stuttered with the answer—he was a U.S. citizen and everybody in the van was a United States citizen.

Q. What happened after that?

A. I asked him if he had anybody that was hidden or any cargo that was hidden in the area that wasn't visible.

Q. What did he say?

A. He said no.

Q. Did you say anything after that?

A. I asked him if he would mind if I looked inside and searched the vehicle.

Q. Did you ask it the way that you just stated you did?

A. Yes.

[28]

Q. And what did he say?

A. He said, "Sure, no problem."

Q. At this time when you asked him for this consent, did you have your gun drawn at all?

A. No.

Q. Did you have him in handcuffs or anything?

A. No.

Q. What was his position and where was he?

A. He was sitting in the driver's seat. The vehicle was running and very simple.

Q. What did you do then when he told you you could look in the car?

A. I walked around to the passenger side and the window was open. I asked him if he'd mind if I open the back door. He stated, "Sure." I said, "Is it unlocked?" He said, "It is." At that point I opened the back door and slid it open. I saw there was one child in the rear seat right there, the middle seat. There was like an ice chest and a bag of chips. And then in the back seat there was two children and I looked back and I smelled what appeared to be an odor of marijuana.

Q. And what did you see?

A. I saw a black duffel bag.

Q. Were these the same two children that you stated before had had their knees at that angle that made you think there was something underneath their feet?

[29]

A. Yes.

Q. Was there something then under their feet?

A. Yes.

Q. So what did you do when you saw that?

A. I saw the black duffel bag which is very commonly used when they transport narcotics. They use black duffel bag a lot. I smelled the scent of marijuana. And I looked up at Mr. Arvizu and I asked him what was in the bag.

Q. What did he say?

A. He kind of put his head down and his tone of voice changed and he stated to open it up and see.

Q. He told you "Open it up and see"?

A. Uh-huh.

Q. Did he do anything with his gestures or anything that was significant to you?

A. His head kind of went down. I've seen this gesture several times when we do apprehend somebody who is conducting illegal activities. Once they give up, once they kind of feel like they have been caught, that is their posture a lot of times. It is kind of an I-give-up thing.

Q. After he said that what did you do?

A. I unzipped the bag partially and looked inside and saw what appeared to be marijuana wrapped in cellophane.

Q. What did you do?

A. I went around the other side of the vehicle and I [30] basically took Mr. Arvizu out of the vehicle, handcuffed him, and placed him in my service vehicle. I asked him if he wanted his rights read in the Spanish or English language. He stated, "English." I did so.

Q. You read him his rights in English?

A. That's correct.

Q. Did you conduct a further search of the vehicle, whether it be at the scene or later on?

A. Yes. We found another bag which contained marijuana in the back of the vehicle.

Q. When you say "the back of the vehicle," what do you mean?

A. Behind the rear seat.

Q. So the duffel bag—correct me if I am wrong, the duffel bag was on the floor in front of the last seat?

A. Correct.

Q. And you found more behind that back seat?

A. On the floor as well.

MS. CABANILLAS: I don't have any other questions at this point, Your Honor.

THE COURT: Very well.

Ms. Brambl.

CROSS-EXAMINATION

BY MS. BRAMBL:

Q. Now, the date this occurred was January 19 of this year, correct?
[31]

A. Yes, ma'am.

Q. That was Martin Luther King Jr. holiday. Is that right?

A. I don't recall.

Q. You don't remember if this was a holiday weekend or not?

A. No.

Q. Now, you mentioned that when you first became aware of the sensor activity, or the call regarding that, that it was around 2:15?

A. Uh-huh.

Q. And you say your shift changes at 3:00?

A. The actual shift comes on at 3:00, or the agents begin clearing the area and heading back to the checkpoint about 2:15, 2:30.

Q. And how many shift changes are there in a day?

A. At that time there was three.

Q. And wherever the agents are then they would go ahead and return between, as you say, 2:15 and 2:30 to the border patrol station?

A. Unless they were occupied at that point, they would begin heading back to the checkpoint.

Q. And you say that's about 30 miles away more or less?

A. The checkpoint—

Q. Let me reask that. The station is in Douglas?

A. The station is in Douglas. That's correct.

Q. Is it close to the border area?

[32]

A. It is within a few miles of the border area.

Q. So when you would leave for shift change would depend pretty much on where you are. If you were right in Douglas, you might not leave until 10 till. If you were way out, you might leave an hour early, right?

A. I don't understand the question.

Q. If your shift changes at 3:00 and, say, you are an hour away, you might actually leave at 2:00, if you are an hour away from your station?

A. No. When I say they return back to the checkpoint, they go from wherever they are at. The ones that are roving around the checkpoint, they usually head back in toward the checkpoint, not to the station.

Q. To the checkpoint?

A. Correct.

Q. So the checkpoint would be at—you are referring to the one at Rucker Canyon and I—State 191?

A. Correct.

Q. So, again, that would depend on how far away you were from the checkpoint when you would return back?

A. There would be varying circumstances, yes.

Q. If you were close by, you might wait until later. If you were further away, you would start earlier?

A. Possibly, depending on what was going on in the area.

Q. So if you were on Leslie Canyon Road doing a roving [33] patrol, you might return up that to Rucker Canyon Road to get to the checkpoint, correct?

A. If you were on Leslie Canyon—I don't understand the question.

Q. Say you are in the middle of Leslie Canyon Road, you look at your watch and you notice it is 2:30, "I have shift change coming up," might not you go up Leslie Canyon Road to Rucker Canyon and head out to the checkpoint that way because it would be quicker?

A. Yeah. There is a chance you may do that, sure.

Q. And although perhaps Leslie Canyon Road is not an extremely heavily traveled road, it is common for you to see other cars from time to time. Is that correct?

A. Common, no, but we do see cars, yes.

Q. Now, the checkpoint that you've referred to and marked on your map with the number 1, is that operational 24 hours a day when it is running?

A. When it is running, yes, it is, ma'am.

Q. But it isn't operational every day of the year. Is that right?

A. That's correct.

Q. How often is that even operational?

A. There is no rhyme or reason to it, just when it goes up. It is decided from the higher-ups.

Q. So a person who wanted to know if there was a checkpoint, [34] they wouldn't be able to know ahead of time necessarily without driving that area to know if it was operational or not?

A. They would know probably because when it does stay up, it stays up for a couple months at a time. Again, there is no rhyme or reason. We don't shut it down like on a daily basis. It is usually through an extended period of time when it goes up.

Q. Do you recall how long your checkpoint had been operational on January 19?

A. No, I don't.

Q. Now, you mention that the sensor activity showed that there was a vehicle on Leslie Canyon Road. Is that right?

A. The original?

Q. Yes, when you first got your call.

A. The northbound vehicle, correct.

Q. On somewhere between Hunt Canyon Road and Rucker Canyon Road?

A. Correct.

Q. So the sensor activity did not relate to border crossing. It wasn't one of those sensors you have right along the border?

A. No.

Q. In fact, that would be, what, 20 or 30 miles north of the border?

A. Correct.

[35]

Q. Was there just one sensor activity notification or were there two?

A. There were two.

Q. And were they both for that same stretch of road between Hunt Canyon and Rucker Canyon or was that only the first one?

A. That was just the first one.

Q. The second one?

A. The second one indicated that the vehicle had began traveling westbound on Rucker Canyon.

Q. So between Rucker Canyon and Kuykendall?

A. Correct, Kuykendall.

Q. And that area both, where the first and second sensor readings were, are again about 20 or 30 miles north of the Douglas border area. Is that right?

A. That's correct.

Q. The shaded area to the east of the area that we've just been talking about where the sensor activity went off, that's all national forest and national monument. Is that right?

A. That's correct.

Q. Are you familiar with the Chiricahua National Monument?

A. Not real familiar, but I know that it exists in that area.

Q. Are you aware that a number of people from Arizona and elsewhere visit that area because it's very scenic?

A. I'm sure they do.

[36]

Q. And there is camping grounds and picnic grounds all in through those mountains and forests?

A. Uh-huh.

Q. Along the road Leslie—from between Leslie Canyon Road and up to Turkey Creek Road, following that route, aren't there numerous roads—side roads

that go off into the monument and the forest to various picnic areas and campgrounds?

A. From Leslie Canyon right here up to Turkey where 181 is?

Q. Yes.

A. Is that what you are talking about?

Q. Yes.

A. No. Actually, there is only one that I know of there is campgrounds and picnic areas and that would be right here at Rucker. It would go eastbound on Rucker actually, not westbound. Between that area is the only legitimate camping ground or picnic area that I know of.

Q. So in Hunt Canyon there is a Hunt Canyon Road?

A. Hunt Canyon is well south of the area we were working. Is this Hunt Canyon? It is kind of hard to read.

Q. It is where you said. Between Hunt Canyon and Rucker Canyon where the first sensor went off?

A. Correct. And Hunt Canyon here—I don't know of any campgrounds, legitimate, organized, campgrounds that are there. If they are I have never heard of them or seen anyone [37] there.

Q. Have you ever seen anyone picnicking or sight-seeing there?

A. Never.

Q. Why is there a road there?

A. I don't know. I believe there is several ranches out there.

Q. Turkey Creek, that would be if you followed Kuykendall Cutoff all the way up, isn't there some picnic and camping grounds up there?

A. On Turkey Creek?

Q. Yes.

A. Not that I know of.

Q. Are you familiar there is a boy scout camp around Rucker Canyon?

A. Yeah. If it is the one I'm thinking of, it would be east on Rucker Canyon.

Q. Right.

A. That wouldn't have anything to do with the traffic that was coming through that day.

Q. All of these roads are public roads, correct?

A. That's correct.

Q. Are any of them gated or you need special permission to enter?

A. Some of the side roads are, but the ones that we are discussing today, no.

[38]

Q. And they are maintained by the state?

A. I don't know who they are maintained by. I know that the Rucker Canyon the graders go through there more often.

Q. And would you agree that on weekends and holidays there is perhaps more traffic on even the rural roads than there is during the week because of recreational use?

A. On weekends and holidays?

Q. Yes.

A. There may be, but, you know, if that is not the case, then the rancher is using the roads during the week. I don't know if there is any increase in traffic during those days out there anyway.

Q. Now, you mentioned that you had received information that Agent Finley sometime earlier had seen a minivan that turned out to be involved in marijuana smuggling on that same road?

A. That's correct.

Q. Are we referring to Kuykendall Road or Rucker Canyon?

A. Both.

Q. And that van—both the marijuana and the van and its occupants were all apprehended with that incident?

A. I know that the marijuana was apprehended. I'm not sure exactly what happened with the van or the occupants. I'm pretty sure they apprehended those as well. I never saw the reports.

Q. So there was no question in your mind that somehow this [39] could be the same van involved in that case?

A. No. That is not what I was indicating, no.

Q. And how long ago in time did that occur compared to the date of this offense?

A. I'm not sure.

Q. Had you personally made any stops on Leslie Canyon, Rucker Canyon Road in the area we are talking about involving marijuana or aliens?

A. Involving marijuana, no. Involving aliens I was the secondary agent on stops. I'd apprehended vehicles in that area before, correct.

Q. You didn't mention those in your report?

A. No.

Q. Is that because you had not had any experience stopping anyone with marijuana or other drugs in their vehicles in that area?

A. I don't understand the question. I'm sorry.

Q. You mentioned in your report and your testimony Agent Finley's experience but not your own in that area. I am just asking is that because you didn't have any marijuana or drug-related stops in that area?

A. That's correct.

Q. About how many sensor hits a day had you been getting in the area where the sensor is activated in this case?

A. I don't recall a day. We usually work ten-hour shifts. [40] I don't know what the whole day would consist of as far as sensor hits. It seems like it may go off once every couple hours or so.

Q. So in an eight-hour shift, maybe four times or more?

A. Maybe, depending on the day, sometimes less, sometimes more.

Q. Now, you mentioned that the vehicle—the minivan slowed down dramatically to about half its speed when you saw it?

A. Approximately.

Q. And you would agree that that is a fairly common reaction when people see law enfor[ce]ment, maybe not everyone, but even law-abiding citizens sometimes do that?

A. They slow down to half speed, no. I don't think that is common.

Q. So how fast or how much did the—when it slowed down, how fast was it going?

A. I didn't have radar. I'm not certified to determine speed. I could approximate maybe 50, 55 and slowed down to maybe 25, 30. I am guessing.

Q. I was going to ask, guesses and approximations?

A. Correct.

Q. When it passed you were stationary. Is that right?

A. That's correct.

Q. So it is not like you could clock it because you were going behind it?
[41]
A. No, not once it passed me.

Q. I'm assuming that you didn't see any driving behavior that caused—that was hazardous for either yourself, Mr. Arvizu, or other people who might be on the road?

A. Driving behavior that was hazardous?

Q. Right.

A. The abrupt turn was a little intense, but other than that, no, just the fact that he was going kind of fast and he slowed down.

Q. He wasn't creating a traffic obstruction or anything either?

A. No.

Q. And in fact you didn't make a traffic stop. Is that right?

A. No, it wasn't a traffic stop.

Q. And just for the record, the full name of the Kuykendall Road is Kuykendall Cutoff Road. Is that right?

A. Kuykendall Cutoff.

Q. However you say it.

A. Kuykendall Cutoff Road.

Q. And it's a cutoff because it is a shortcut. Is that correct?

A. That I don't know.

Q. You have driven in that area a lot. Haven't you noticed that it is shorter to go that way than to go the long way [42] around?

A. Depending on where you are coming from. Coming from Douglas it is absolutely not shorter. It is quicker to take the highway. If you are coming from another area, maybe way out here, it might be shorter.

Q. And you stated that when you first saw the driver and looked over at him that he was sitting stiffly and tightly gripping the steering wheel. Is that correct?

A. Right.

Q. Wouldn't you agree that a fairly common reaction among even law-abiding people is to sometimes do just that, sit stiffly and pay extra attention to driving when they notice law enforcement?

A. Actually, no. In my experience, when we sit and do traffic observations or road patrol, most of the citizens look over and see what is going on. They want to see what is going on, especially when they see it is law enforcement. Most of them look. In that area most of them would give us a friendly wave. The driver would give us a wave.

When they did stiffen up and get real rigid and their posture was that stiff, it usually indicated that they were trying to hide something.

Q. So the fact that Mr. Arvizu and his passengers didn't smile and wave at you, that made you feel suspicious?

A. The fact—his mannerisms that he had when he became [43] stiff and rigid and didn't acknowledge that I was in the area, that was suspicious, yes.

Q. And you've also mentioned that the children who were passengers, at least a couple of them, their knees looked to be higher up than normal, as if maybe they were—their feet were resting on something?

A. Correct.

Q. And you mentioned that their knees were about level with the seat. You mean the bottom part of the seat where they would be—how high up were they, I guess is what I want to know, level with the bottom of the seat, their shoulders or—

A. Higher than normal. Not as high if the kid puts his feet up on the seat and you know how his feet are chest high, not like that. It was higher than normal. You could see there was an elevation there. It looked awkward because the feet were in the normal foot space but at a higher level which was very suspicious.

Q. They weren't as high as chest or shoulder level?

A. No.

Q. You obviously couldn't tell what they were resting on, whether it was pillows or luggage or—

A. No, I couldn't.

Q. —or anything else?

A. I couldn't tell.

Q. Now, you said that the driver and passenger not smiling [44] and waving at you was unusual. You also found it unusual or suspicious that the children began waving to you?

A. Yes. The reason that was suspicious is because usually, from what we can see when kids wave to the border patrol agents, they turn and wave and you can see it is a genuine wave. The oddity in this particular circumstance is that they continued facing forward and their hands all kind of went up at the same time and they were moving their hands around. To me it seemed like they were being instructed. That was just something that I noticed that was very odd to me.

Q. But doesn't just about every kid in the world wave at you guys?

A. A lot of children do, but they usually turn and wave.

Q. And do you know whether the sensor activity in the area that—the two areas we have discussed, did that go off at all within—after Mr. Arvizu's car passed through?

A. From what I am aware when I was out there, it had not, no.

Q. I want to talk for just a second about the turnoff. You said that for maybe several hundred yards he had his indicator on indicating that he would be turning from Rucker Canyon onto the Kuykendall Cutoff?

A. Yes. I don't know exactly the distance, but, yeah, he turned it on prior to that turnoff.

Q. Was it on for like a few seconds, like half a minute?
[45]
A. It was on kind of early. I noticed that it went on kind of early and then it went back off, and then right before he turned, it went on again.

Q. And how long was it turned off, just for like a matter of five seconds, or was it quite awhile it was turned off?

A. I don't recall the time, but I recall that it was off for the amount of time I noticed it was off, and then it went back on as if maybe he changed his mind about turning.

Q. So fairly brief time that it was off?

A. Probably.

Q. Then it went back on and almost right away he turned onto the road?

A. Correct.

Q. About how far behind him were you at this point?

A. Maybe a couple of car lengths. I can't recall exactly. A few car lengths.

Q. Is that pretty much what you stuck to the whole time you were behind him until you did the stop?

A. No. Originally I got a little bit closer so I could get a reading on the license plate. Then I backed off and followed him from a greater distance.

Q. Now, the roads that we have been talking about so far, Leslie Canyon is a pretty flat, well-maintained road. Is that right?

A. It's maintained by somebody, yeah.
[46]
Q. It is not real bumpy or—

A. Leslie Canyon?

Q. Uh-huh.

A. No, it is not real bad.

Q. That is true of Rucker Canyon Road also. Is that right?

A. Rucker Canyon—

Q. At least the stretch we are talking about?

A. The stretch we are talking about yeah. It gets rougher once you get into the forest area. It gets pretty rough.

Q. And none of these roads are four-wheel-drive-only roads, correct?

A. No, not only, but normally.

Q. So you would normally use a four-wheel drive even on Leslie Canyon Road?

A. Not that I would normally use, but that is the normal traffic that we see out there.

Q. And is that also—you mentioned your service vehicle, that you are not supposed to take sedans on certain roads. Would Leslie Canyon Road be one you take your four-wheel drive border patrol vehicle on?

A. Would we take a four-wheel drive on Leslie Canyon? Sure we would take a four-wheel drive.

Q. The road is perhaps slightly rougher once you get off onto Kuykendall Cutoff. Is that right?

A. Yes, Kuykendall is rougher.

[47]

Q. Even that road is not a four-wheel-drive-only road?

A. No. You can pass through in a sedan or a van. I've seen—in the past I've seen exhaust—or the mufflers and stuff on the side of the road. Sometimes when it gets washed out, it gets pretty bad and the cars scrape.

Q. The day you were on there the road wasn't washed out?

A. Was it washed out? Is that what you are asking?

Q. It was not washed out. Is that right?

A. I don't recall.

Q. You probably would have mentioned that in your report as a factor if it had been. Is that correct?

A. I did mention the terrain as a factor, yes, I did.

Q. There is nothing in your report to indicate that any portions of that road had been washed out, though. Is that correct?

A. No, there is nothing indicating that.

Q. At the point you made the stop, about how far from the border were you?

A. When I made the stop?

Q. Yes. You would be at least 30 miles. Is that right?

A. Probably.

Q. Maybe a little more?

A. Maybe a little more.

Q. When you did the registration check, that was pretty much when you started to follow the vehicle?

[48]

A. If I recall correctly, I did the registration check at about the time he turned or so, something like that.

Q. At the time he turned onto Rucker Canyon from Leslie Canyon?

A. No.

Q. Or from Kuykendall?

A. Around Kuykendall, if I recall correctly.

Q. The van was not stolen?

A. No, the van was not stolen. I did a registration check and to see if it was stolen.

Q. It wasn't from Mexico. It had Arizona plates, correct?

A. Correct.

Q. The plates were registered to Leticia Arvizu in Douglas?

A. Right.

Q. The address was 403 4th Street?

A. Correct.

Q. Now, you said in your testimony that this area—general area was I believe you used the word "notorious" for drugs and alien smuggling?

A. Correct.

Q. Would you agree in your report when you described the area you said that it was extremely popular for alien smugglers to use when stashing aliens before transporting them north?

A. I did state that.

[49]

Q. You didn't mention anything about drugs in your report in that area?

A. No, I didn't.

Q. And you also mentioned that you were—or your agency was familiar with several addresses in that area that had problems associated with them for alien smuggling?

A. Correct, and several groups are apprehended daily in that area attempting to get into stash houses and such there.

Q. But this particular address, 403 4th Street, that wasn't an address familiar to you or information you received from your agency that there had been problems there before?

A. I don't understand the question.

Q. 403 4th Street you have never apprehended aliens or determined that that was an alien smuggling location?

A. Have we apprehended? I don't know if we have apprehended aliens.

Q. Certainly you had no information before you when you made the stop like that, correct?

A. That that particular address, no.

Q. Yes. The same with drug trafficking, nothing to put a hit on that particular house?

A. Right. Just the general area is—like I said, it is very notorious for that type of smuggling.

Q. And the same with Leticia Arvizu. There was nothing in the information you had before you that that was a name [50] involved with alien or drug smuggling before?

A. Correct. Very rarely do I make a stop that we know prior that this person was involved.

Q. Now, your report indicates that you stopped Mr. Arvizu's vehicle not because you thought it had drugs in it but to perform an immigration check on the occupants. Is that right?

A. Correct.

Q. Now, you had a clear view when you were following that there was a passenger, a driver, and children, correct?

A. Correct.

Q. Was there anything about their appearance that made you suspect they were illegal aliens?

A. About their appearance, no, not about their appearance. About their mannerisms, yes, about the mannerisms about the way—all the circumstances, the totality of the circumstances I mentioned, all of them led me to believe there was some type of illegal alien smuggling involved.

Q. And did the vehicle stop right away when you—I'm assuming you turned on your lights first?

A. Correct.

Q. Then did it stop pretty much right away?

A. It did.

Q. No attempts to flee or evade you?

A. No.

Q. Now, when you stopped the vehicle, did you go up to the [51] driver's window?

A. Yes, I approached from the driver's side.

Q. And did you, for officer safety reasons, put your hand on your gun or take the gun out of the holster?

A. No.

Q. Why didn't you do that?

A. Why didn't I do that?

Q. Right.

A. It is not common practice to do that for me. During daylight on a vehicle stop when there are children involved that is not something I practice.

Q. And your first question was asking Mr. Arvizu if he and his passengers were U.S. citizens, or did you ask him first where he was going?

A. He initiated the conversation. He stuck his head out the window and asked how I was doing. He was starting the small talk. So I asked him, "Hey, where are you guys coming from? Where are you heading to?" Shortly after that is when I asked him about his citizenship, correct.

Q. Did you ask him to show you any kind of proof that he and the occupants were U.S. citizens, or were you satisfied?

A. It's not mandatory for U.S. citizens to provide proof. It is our—it is our duty to determine their alienage through the questioning. That is why I continued the questioning.
[52]

Q. So after he answered you in fluent English that he was a U.S. citizen, were you still suspicious that he might not be?

A. I was suspicious that he might have somebody or something in the back because of his nervous behavior that there was something wrong. It wasn't normal. When we have traffic stops with somebody who is not doing anything wrong, their behavior is quite different.

Q. And did you ask him if there was anyone hidden inside the vehicle?

A. Yes.

Q. He answered no?

A. Correct.

Q. And do you remember what your exact words were when you asked if you could look around or inside the vehicle?

A. I don't know exactly, but my normal response is "Would you mind if we take a look inside and search the vehicle?" That is what I believe I said.

Q. You didn't write down in your report the exact words that you used, correct?

A. I don't think I did.

Q. And do you remember exactly how he responded or what he said?

A. The exact words no, but he indicated sure, why not type reaction, no objection.

Q. And you didn't ask for written permission to look inside?

[53]

A. No.

Q. He didn't sign a consent or anything?

A. No. That is also not normal.

Q. And during this time your testimony is you didn't have your hand on your firearm or have it withdrawn for any reason?

A. No, I didn't.

Q. Did you tell Mr. Arvizu that he had the right to refuse to give you consent to look inside his car?

A. No. I simply asked if he would mind.

Q. Before you asked to look inside, you did not read him his Miranda warnings. Is that correct?

A. That's correct.

Q. You only read those after you looked inside and found what appeared to be marijuana?

A. Correct.

Q. And it wasn't until after Mr. Arvizu—until you asked whether you could look in the car that you put your head in the window. Is that right?

A. Correct. When I walked around the vehicle and the passenger side window was open, that is when I wanted to make sure it was okay to open the door. And it was

unlocked. He said, "Sure, no problem." It was unlocked.

Q. It was after all that happened that you put your head inside the vehicle and you noticed an odor of marijuana?

A. Correct.
[54]

MS. BRAMBL: Can I have a moment, Your Honor?

THE COURT: Yes, you may.

MS. BRAMBL: Can I approach the easel?

THE COURT: Yes.

BY MS. BRAMBL:

Q. I have one more question about the turnoff.

From Rucker Canyon to Kuykendall, the intersection there—

MS. BRAMBL: Can I go back and get a picture?

THE COURT: Yes.

MS. BRAMBL: May I approach the witness?

THE COURT: Yes, you may.

BY MS. BRAMBL:

Q. I'm showing you what has been marked Exhibit Number 5. Does that depict the area where the vehicle turned onto Kuykendall Road?

A. I believe it does. It looks familiar.

Q. That intersection is kind of a three-way intersection because it's got Rucker Canyon and Kuykendall and Rucker Canyon going the other way. Is that right?

A. Rucker Canyon runs straight through. It is like a T.

Q. There is sort of like a little island in the middle?

A. Correct.

MS. BRAMBL: That is all the questions I have.

THE COURT: Thank you.
[55]
Ms. Cabanillas.

REDIRECT EXAMINATION

BY MS. CABANILLAS:

Q. Ms. Brambl asked you some questions about the children waving and what she considered to be the normal behavior in kids. Is it the waving that you found to be significant or the manner in which the waving occurred?

A. It was the manner.

Q. Just to refresh our memories, how long did the children keep up this behavior?

A. They did it for approximately four to five minutes.

Q. Ms. Brambl also asked you about your conversation with Agent Finley about—Agent Finley, is that his name?

A. Correct.

Q. Who was the one who told you about the van. Do you remember that?

A. Uh-huh.

Q. She asked you whether he had made the apprehension of those people. What was your response to that?

A. If he had made the apprehension of those people?

Q. The individuals that were throwing out marijuana.

A. I believe he did.

Q. Was it—as far as the fact that he may or may not have apprehended those people, was there anything significant with the fact that—with the type of vehicle that Agent Finley [56] had discussed and the type of vehicle you saw in this case?

A. That was the significance of it was the type of vehicle used on the prior case in accordance with this case.

Q. She asked you some questions about the general area too and she was asking you about picnic areas and such. Where the first sensor went off, you stated that was where again, in the general area?

A. Between Hunt and Rucker Canyon.

Q. Did you state whether or not you found this particular vehicle the defendant was driving was from that area? Did you indicate you thought it was a vehicle that was normally from that area?

A. Yeah, I had never seen that vehicle in that area before.

Q. Hunt Canyon I believe Ms. Brambl was making generalizations about the picnic areas and such. Are you familiar with any off Hunt Canyon Road?

A. That is negative. I'm not familiar with any.

Q. Are you familiar with the fact that there may be a sign there that indicates there is no picnic grounds?

A. I believe there is.

Q. Well, when I say that, I don't know whether the sign says no picnic grounds or not. Do you know whether there is a sign that says that?

A. There is a sign—I don't recall what it says. There is a sign on that road that indicates that—I think it is a [57] forest service sign or something to that effect. I don't believe there is picnic areas on that route of travel.

Q. Do you know whether or not that is a route towards private residences?

A. I think it is. I think—it has always been my impression that area was either a forest land road or not to the campgrounds but to a ranch in that area. I see ranchers come off that road.

Q. So in your knowledge and experience then, would it seem likely this particular vehicle was doing an outing, having come from Hunt Canyon Road?

A. No. I don't think Hunt Canyon is traveled—you can travel in a minivan or sedan on that road.

Q. Do you know if the vehicle had not come then from the area of Hunt Canyon Road, where would it have come from on the south?

A. It would have had to have come from the Douglas area. If it didn't come from here, there is really not a lot of options back here. Most likely it would have come from the Douglas area and gone north.

Q. Most likely it would have come from Douglas?

A. Correct. The other area it may have come from would have been McNeal, but that would have been the long way around.

Q. And I think I asked you about apprehensions in that area. You stated—how many times did you state that you have—[58] you personally or other agents seized illegal aliens or drugs in that particular area we are talking about?

A. There has been several apprehensions in that area. I mean, when the checkpoints are up, it is on a daily basis. Me personal I have been a secondary agent to many. I've had apprehensions. I don't know how many. I've had apprehensions in that area as well.

MS. CABANILLAS: I don't have anything else, Your Honor. Thank you.

THE COURT: Ms. Brambl.

MS. BRAMBL: I have no further questions.

THE COURT: Thank you, sir. You may step down.

MS. CABANILLAS: That is the government's only witness.

THE COURT: Ms. Brambl, does the defense have any witnesses?

MS. CABANILLAS: May Agent Stoddard remain as my case agent?

THE COURT: Yes.

VICTOR CHACON, DEFENSE WITNESS, SWORN

THE CLERK: Please state your full name and spell the last for the record.

THE WITNESS: My name is Victor Daniel Chacon. C-h-a-c-o-n.
[59]

DIRECT EXAMINATION

BY MS. BRAMBL:

Q. Where are you employed?

A. I'm staff investigator with the federal public defender's office here in Tucson.

Q. And how long have you been there?

A. Seven years.

Q. And before that what kind of work did you do?

A. I was with the Tucson Police Department.

Q. And can you briefly tell me about your experience there?

A. I was a patrol officer. I was a detective. And the last seven or eight years I was a supervisor, a sergeant. I supervised officers in the field as well as investigators and detectives. I was in charge of the hostage negotiations unit. I ran a substation, the west side substation. It was called Adam 1. That was in essence a small police department in itself. It had investigations, crime prevention, patrol, budgeting, and all that part of police work.

Q. Thank you.

MS. BRAMBL: May I approach?

THE COURT: Yes, you may.

MS. BRAMBL: Your Honor, if I could approach, this Exhibit 1-A is a somewhat smaller version of that.

THE COURT: Very well.

BY MS. BRAMBL:

[60]

Q. Can you tell us what you did in connection with your investigation in this case?

A. I went out to the area as indicated in the officer's reports and drove around and took some photographs.

Q. And can you tell us the map that has been marked as Exhibit 1 just generally what that depicts?

A. I'm having some difficulty. May I step down?

Q. Sure.

A. It's a map of that area of southeastern Arizona from the Arizona-New Mexico county line—or state lines to an area east of Elfrida and from the Mexican border all the way up to just south of Willcox, Arizona.

Q. And can you show us on the map the routes that you traveled in connection with investigating the case?

A. Yes, I can. Actually, I started up here and drove all the way down from I-10. I drove all the way down 191 to Rucker Canyon where Rucker Canyon and 191 intersect. I drove east along Rucker Canyon Road and up to Kuykendall Cutoff Road and then north along Kuykendall Cutoff all the way up to 181, at the intersection of 181, Kuykendall and Turkey Creek Road.

And then later on I went back and drove again from 191 along Rucker and then down Rucker Canyon Road to Leslie Canyon Road and then all the way down into Douglas on Leslie Canyon Road and get a real clear—anyway along Leslie Canyon Road all the way into Douglas.

[61]

Q. And does that map accurately depict the route that you took?

A. Yes, it does.

MS. BRAMBL: I would move for the admission of Exhibits 1 and 1-A.

THE COURT: Shall be admitted.

BY MS. BRAMBL:

Q. Can you tell us what the road conditions were like perhaps starting from Leslie Canyon Road and working your way up to Kuykendall?

A. Actually, I started the road beginning at the south end of Leslie Canyon Road which actually starts right at the front step of the border patrol station. The road is paved for about ten miles and there is residences all the way around on both sides. Then approximately 24 miles from Kuykendall Road the road is dirt and well maintained, obviously used. Generally the area itself is not heavily populated, but there are people living out there in and around ranches. Up to Kuykendall it is pretty much as the officer described it, somewhat remote.

Q. And what kind of vehicle did you drive on the road?

A. I drove—on the one occasion I drove a 4X4, but it didn't require the use of that option. On another occasion I drove just a two-wheel-drive vehicle.

Q. When you drove on Kuykendall Road in particular, were you [62] required to use your four-wheel drive at all?

A. No, not at all.

Q. At any point in your travels were there any signs informing you from Leslie Canyon all the way up

through the end of the Kuykendall Cutoff Road that you had to use a four-wheel drive on the highway or those roads?

A. No.

Q. Were there any warnings or restrictions at all about travel on those roads?

A. Not on those roads, no.

Q. Were there other restrictions perhaps on other roads in that area?

A. Yes, there was. Off of Kuykendall Road about—I think about four miles north of Rucker Canyon there was a side canyon, I don't recall, Bradshaw Canyon, or something like that, where there is a forest service sign that says, "High occurrence [*sic*] vehicles recommended endurance."

Q. On any of your trips on those roads, had it been raining recently?

A. No.

Q. You can go ahead and have a seat.

I would like you to take a look at Exhibits 3 through 9. If you can, briefly tell us what general area they depict and then what each picture shows.

A. This is Exhibit Number 3 I took at mile 18.6—or [63] milepost 16 looking towards Douglas on Leslie Canyon Road. It depicts the desert on both sides of the roadway and a very flat roadway. I was looking south, I believe, at this point, yes.

Q. Thank you.

A. Then Exhibit Number 4 was at mile 20.4 from Kuykendall and Rucker Canyon Road intersection. I'm still looking south. This is where the Leslie Canyon Road or McNeal Road splits off from Leslie Canyon Road and then goes west. McNeal—I'm sorry—Leslie Canyon continues south to the left. Again, the roadway is very flat and well maintained and well used according to the roadway.

Exhibit Number 5 I took at the intersection of Kuykendall Cutoff and Rucker Canyon Road, and I took this from the west side of the little desert island that is in the middle of the roadway where they converge there. At that point I'm looking southeast onto Rucker Canyon Road and the photograph also has a street sign, Kuykendall Road Cutoff, and the back of a yield sign and there is a yellow sign farther to the south. I really can't read what it says. But they are typical road signs.

Then Exhibit Number[ ] 6 is also a photograph of Rucker Canyon Road where it intersects with Leslie Canyon Road. There is the road sign. The one closest to me is the T sign indicating that there is an intersection, you are [64] approaching an intersection. Then the next sign says, "Stop ahead." Then at the intersection there is a stop sign and arrows indicating the road goes in both directions at that point, and also the roadway at this point is very flat.

Number 7, Exhibit Number 7, I took at mile 17.3 from Kuykendall Road and on Leslie Canyon Road. And this is a depiction of a monument. I couldn't read what it says there. It is an old monument. Also depicts the roadway and how it is graded.

MS. CABANILLAS: Your Honor, on that exhibit, did he say Kuykendall at Leslie Canyon?

THE WITNESS: I said this is 17.3 miles from Kuykendall on Leslie Canyon Road.

MS. CABANILLAS: Thank you.

THE WITNESS: Then Number 8 I took eight miles from Kuykendall Cutoff looking south and it just depicts again the character of Leslie Canyon Road at that area.

And then Number 9 shows the road character looking west at the intersection of Leslie Canyon and Rucker Canyon Road. There is a sign there "Frontage road"—I'm sorry—"Primitive road drive with care," and below that sign is a precautionary speed limit sign that says 35 miles per hour. The road curves off to the left or to the west at that point. And, again, the road character is flat and well maintained.

BY MS. BRAMBL:

[65]

Q. Do Exhibits 3 through 9 accurately depict the way the road looked when you were driving it?

A. Yes.

MS. BRAMBL: I would move for the admission of Exhibits 3 through 9.

THE COURT: Any objection?

MS. CABANILLAS: Can I see 3 through 9, Your Honor?

THE COURT: Yes, you may.

MS. CABANILLAS: Other than general relevancy grounds because it is so far away from where the activity occurred, I have no objection to general ability for knowledge.

THE COURT: Shall be admitted.

BY MS. BRAMBL:

Q. I would like you to take a look at—

MS. BRAMBL: May I approach and publish?

THE COURT: Yes.

BY MS. BRAMBL:

Q. Would you take a look at Exhibits 10 through 14 and tell me what area they depict?

A. They depict that area between Rucker Canyon and 191 and Kuykendall Road on Rucker Canyon.

Q. And can you just describe briefly what is set forth in each picture?

A. Exhibit Number 10 is the intersection facing south of [66] Rucker Canyon Road, Courtland Road, and Highway 191. I took this photograph from the north of the intersection.

Number 11 is essentially the same photograph, a little bit closer view, with a vehicle turning south out of Rucker Canyon Road and another vehicle at the intersection facing east on Courtland Road.

Exhibit Number 12 is a photograph at the intersection of Kuykendall and Rucker Canyon Road facing west along Rucker Canyon Road essentially showing the character of the roadway of Rucker Canyon Road traveling west from that point.

Exhibit Number 13 is a photograph on Rucker Canyon Road as I was traveling east, and I took the photograph as I was driving, of a vehicle coming west on Rucker Canyon Road from the area of Kuykendall Cutoff.

Exhibit Number 14 is a photograph of the character of Rucker Canyon Road facing east just before one arrives at the intersection of Kuykendall and Rucker Canyon at milepost number 6 and it shows, again, the road is well traveled and often maintained.

Q. Do those photographs accurately depict the way the road appeared when you were driving it and taking pictures?

A. Yes.

MS. BRAMBL: I move for the admission of Exhibits 10 through 14.
[67]

MS. CABANILLAS: Can I see 10 through 14, Your Honor?

THE COURT: Yes, you may.

MS. CABANILLAS: Thank you.

No objection.

THE COURT: Shall be admitted.

MS. BRAMBL: May I approach?

THE COURT: Yes, you may.

BY MS. BRAMBL:

Q. Would you finally take a look at Exhibits 15 through 33 and just tell me what area or part of the road they depict?

A. These photographs depict that area between Kuykendall and 181 on Kuykendall—I'm sorry—between Rucker Canyon and 191 on Kuykendall Road Cutoff.

Q. You drove the whole length of that road, correct?

A. Yes.

Q. Are the pictures uniform in showing—are the road conditions variable on that road or uniform?

A. Actually, there is only one wash that traverses that entire seven-mile length. Other than that the road is uniform.

Q. Is that what those pictures depict?

A. Yes.

Q. Do they accurately depict the road as you saw it when you drove on it?
[68]
A. That's correct.

Q. And were there any rough portions of the road that somehow were not photographed?

A. No.

MS. BRAMBL: I move for the admission of Exhibits 15 through 33.

MS. CABANILLAS: Please.

No objection.

THE COURT: Shall be admitted.

MS. CABANILLAS: What were the numbers again?

MS. BRAMBL: 15 through 33.

MS. CABANILLAS: Thank you.

BY MS. BRAMBL:

Q. About how far was it from the area of the Kuykendall Cutoff and Rucker Canyon Road to the border patrol station in Douglas?

A. Almost 35 miles.

Q. And that was the mileage that you kept track of and made a note of?

A. Yes.

Q. And were you able to determine whether Kuykendall Road was a shortcut from any location to any other location?

A. Yes.

Q. Tell us about that.

A. May I show you on the map?
[69]

MS. BRAMBL: May the witness step down, Your Honor?

THE COURT: Yes, you may.

THE WITNESS: Actually, as I said before, there is residences all the way up to about 24 miles from that area. As one approaches Douglas, you have ranches and settlements here. There is a settlement in Hunt Canyon there and the road is maintained by the state. There is signage that indicates that.

Then once you get to 191, you have the settlement of Sunizona. There are residences all along 191 all the way up to the intersection of Turkey Creek and Kuykendall. There is also homes along the road that lead up to the monument. And then this road itself will eventually wind up around Bowie.

And so that if in fact you are living along the roadway between 191 and 186, then this would be certainly a shorter route if you are traveling to Douglas rather than have to drive all the way out to 191 and travel down south into Douglas or vice versa. If you live in the area and need to go up, that is a shorter route to take, Kuykendall.

Q. Can you describe—you mentioned you saw a number of houses and ranches—just where some of the bigger locations or more populations occur?

A. Along 181 you have Sunizona. There is schools there. There is homes that are all up in here along into the desert. There is a home—fairly beautiful home

about this area here. [70] I think there is two settlements here.

Q. Where are you describing?

A. Just north of the intersection of Kuykendall and 181 as you approach or head towards the Chiricahua National Monument in this area here. There is one beyond, a little ranch, where I turned back around. There are homes again all in this area. You can see there is a number of streets up here. And if you want to travel in that area, it is certainly more practical to travel that area rather than on 191. I think it is 12-point-some-odd miles back out to 191 from that area.

Q. And to the east of the area we are talking about and the monument or close to it, can you describe some of the locations that you are familiar with there as far as picnicking or destinations that people might go to?

A. Well, this roadway that we are discussing, Kuykendall, Rucker Canyon, a lot of people use this for biking. There are roads in the monument itself that people use for biking, and associated with that you have camping and whatnot. And there is no obstruction, anybody can go anywhere within the monument that is accessible and do camping and picnicking and that sort of thing.

Q. Is that a common location for people who live in Douglas to use for recreation?

A. Yes, it is.

Q. I think you can have a seat again.
[71]

Can you briefly describe to us the intersection of Rucker Canyon and Kuykendall Road?

A. Well, it is a confluence of both those roads, and Rucker Canyon begins at 191 and then angles and turns south at that location. Kuykendall runs off of that and goes north. So you have these two roads that ease into one another. Rucker Canyon, I have to draw it to describe it properly.

MS. BRAMBL: May he use the easel, Your Honor?

THE COURT: Yes, you may.

THE WITNESS: As I said, this hopefully will explain it. This hopefully depicts that intersection, the confluence of these two streets.

What occurs is that Rucker Canyon comes around kind of in a circle in this manner. Kuykendall joins it going north. And there has been another road cut just on the west side creating kind of an island. But there is no corners there so that they both generally melt into one another in any direction that you go. There is a street sign here and there is also a mailbox, I think, in the middle. I'm not sure what ranch that belongs to. But essentially that is what the intersection looks like.

BY MS. BRAMBL:

Q. Can you draw like a continuous line from the description of where the vehicle in Mr. Arvizu's case would have been coming north on Rucker Canyon and how it would proceed onto [72] Kuykendall?

A. My understanding is that Mr. Arvizu came from Rucker Canyon from the south and then turned onto Kuykendall Road in this manner here. This is all just circle. I will indicate that arrow by writing a 1 and circling it next to it.

MS. BRAMBL: Thank you. I would move for the admission of Exhibit 34 for illustrative purposes.

THE COURT: Any objection?

MS. CABANILLAS: Only on relevance, Your Honor.

THE COURT: Shall be admitted, overruled.

MS. BRAMBL: That is all the questions I have on direct.

THE COURT: Very well.

CROSS-EXAMINATION

BY MS. CABANILLAS:

Q. You said you work with the federal public defender's office?

A. That's correct.

Q. How long have you worked with the public defender's office?

A. Seven years.

Q. In your experience you stated you had some law enforcement experience?

A. That's correct.

Q. What were the locations you stated you worked?
[73]
A. Well, actually, I worked all over Tucson.

Q. In Tucson?

A. Yes.

Q. Have you ever worked in the Douglas area?

A. No. I lived there.

Q. As far as these roads are concerned, I believe you stated you agree this is a remote area where this is taking place? I think you stated that on direct?

A. Yes.

Q. You stated that—when you were driving around taking these pictures, you were driving what car?

A. On one occasion I drove—well, they are both Jeeps. One is a 4X4 and the other one is not.

Q. But they are both Jeeps?

A. Yes.

Q. The white Jeep that is in these pictures, sort of, is that the one you were driving?

A. Yes.

Q. That is not a minivan. Is that correct?

A. It's not a minivan?

Q. Correct.

A. I don't know. Some people might call it that. I don't know.

Q. What kind of vehicle is this?

A. A Jeep.
[74]
Q. Jeep Cherokee?

A. Yes.

Q. Jeep Cherokee is not a minivan?

A. I don't know. If you want to call it that.

Q. I wouldn't. I am just wondering.

A. I wouldn't either.

Q. Just checking there.

You stated that on Kuykendall there was a point where there was a sign that said "High clearance vehicles"?

A. "Recommended."

Q. That was on Kuykendall?

A. It was a road off of Kuykendall.

Q. You stated that—on direct Ms. Brambl asked you whether or not these pictures of Kuykendall—if there were any rougher parts of Kuykendall that you hadn't taken pictures of. I notice there was quite a delay. Would you agree there are parts of Kuykendall that are a little rougher than the pictures you have taken?

A. I was looking at the very first part, the very first photographs. That is probably the roughest it had gotten. I was trying to recall if there was any other part. That is why I indicated there was one other area and that was where the only wash that I saw traversed the roadway and I did take a photograph of that.

Q. But would you agree then there are rougher parts then [*sic*] [75] were reflected in your picture?

A. No.

Q. You stated that you took a picture of what then? Perhaps, I'm sorry, I misunderstand.

A. The rougher area I could see was at the very beginning of Kuykendall at the intersection. Apparently it had not been graded in awhile, that entire area. That was the roughest I saw. The only other area that came to mind that you could consider rough on a roadway is that area that I did photograph of the wash that traverses the roadway, the only wash. Otherwise, the road is as I photographed it.

Q. Do you recall that as you were driving on Rucker Canyon there was a creek that sort of traversed just before Mountain Queen Road? Do you remember seeing a creek, driving through a creek?

A. Can you give me a better reference point?

Q. Sure. Hold on.

Showing Government's Exhibit 41. My question would be, using the pointer: Do you remember a creek running across—traversing Rucker Canyon Road just

short of Mountain Queen Road or just past Mountain Queen Road? Do you remember that?

A. No, I do not.

Q. Is it possible on the date of this stop there might have been a creek like that?
[76]

A. On Rucker Canyon?

Q. Yes.

A. More than likely.

Q. What date did you say you took these pictures? I'm sorry. I have forgotten.

A. I don't think I said. But I think it was September 11 and September 28.

Q. September 11 and 28?

A. Yes.

Q. So that was this year then?

A. Yes.

Q. About nine or so months then after the stop in this particular case that happened in January?

A. Apparently so, yes.

Q. Could the road then in January have been different or more rugged than the road that you traveled nine months later? Is that possible?

A. It is possible that it was even better then. I don't know.

Q. You stated, and I got confused, that—when Ms. Bramble asked you whether Kuykendall Road was a shortcut for anything, you described—I think you said if you live along 186. I didn't quite understand. Can you explain that again, how is it that Kuykendall is a shortcut? Explain what that one was.

A. It is called Kuykendall Cutoff. That means that it is a [77] shortcut, number one. If you live anywhere east of 191 anywhere along that roadway, I think 186 is part of that area, then it certainly would be a shortcut.

Q. If you live east of 191, then you mean like east of Elfrida and east of those places?

A. East of Sunizona, anywhere east of 191.

Q. And if somebody travels from Douglas and they are trying to get to, let's say, the I-81 cutoff there that runs east to west north of where we are talking about?

A. Yes.

Q. You measured that in miles. Is that what you are saying? You drove the back roads and the highway and I seem to recall you saying that it was about 12 miles?
A. From the intersection of Kuykendall, Turkey Creek, and 181 back to 191 is 12.3 miles, or something like that.

Q. Would you agree with me if you are coming from Douglas and heading up north that 191, the route that leads from Douglas straight up to where the checkpoint was located, would be the quickest route?

A. To do what?

Q. To get north.

A. Where north?

Q. North to Tucson.

A. Not to Tucson. But if I wanted to get—if I wanted to travel east on I-10, that would be the shortest way, wind up [78] east of Willcox in the Bowie area, if you take that roadway.

Q. Let me rephrase my question. To get to a major highway then north of where we are talking about, the quickest route from Douglas is the route that would lead to the checkpoint. Is that true?

A. I'm sorry. I'm losing you.

Q. The highway that is north of the area we are talking about, which would be the next major road to hit, if you are traveling from Douglas and you want to hit that major highway, would the quickest route be I-191 that leads up through where the officer said the checkpoint was that day?

A. Again, depends on where you want to go. I don't know.

Q. And I am asking you particularly the highway that you just spoke of, the one that would be east?

A. Yes.

Q. Would you agree that Douglas—from Douglas to that highway would be the quickest route?

A. Depends on where you want to go, if you want to go east or you want to go west.

Q. If you are going—maybe you can clarify this for me. Where does 191 take you? Where does it hit north?

A. It leads up to I-10 just west of Willcox.

Q. So it leads to I-10. Let me clarify. The quickest way from Douglas to I-10 would be down Highway 191 north?

A. I will answer you again. Depends on which direction you [79] want to go.

Q. Would you agree that 191 is paved?

A. Sure.

Q. And the road—Leslie Canyon and all the other roads we have been discussing about, Rucker, Kuykendall, they are all dirt roads?

A. Until you get up to 181. Beyond that it is paved.

Q. Let me clarify. Then from Douglas, Leslie Canyon north, the road Leslie Canyon which leads north from Douglas, would you agree that starts being dirt—at this point north of Douglas there comes to be a point when it becomes a dirt road?

A. Yes.

Q. Then it leads all the way north and hits Rucker Canyon?

A. Yes.

Q. And leading up to that Rucker Canyon is dirt?

A. Yes.

Q. And then leading—then Rucker Canyon itself is a dirt road from the intersection of Leslie to at least east of Kuykendall. Is that right? Rucker is a dirt road from Leslie Canyon east of Kuykendall?

A. Rucker runs east and west.

Q. Right.

A. That is dirt.

Q. When you say east and west—

A. And it goes south and then east again into the monument, [80] yes.

Q. And my question is: When it hits Leslie Canyon, it's a dirt road, right?

A. Yes.

Q. And when it hits Kuykendall, it's a dirt road?

A. Yes.

Q. Then Kuykendall is a dirt road all the way until just short of Turkey Creek?

A. Correct.

Q. You kind of drew a picture over here, Exhibit 34. I'm showing you what has been admitted as 23 and 12. On Exhibit 12 where your Jeep Cherokee is parked, is

that the turnoff then that you have indicated from Rucker to Kuykendall? If somebody was traveling—

A. From the south.

Q. Let me ask it. If somebody is traveling from the east towards west on Rucker and then hangs a right-hand turn on Kuykendall, the right-hand turn -- it looks like your Jeep Cherokee is parked on the right-hand turn where Kuykendall is. Is that correct?

A. That's right.

Q. That is a little bit of a T-turn there, would you agree, a right turn?

A. Yes.

MS. CABANILLAS: I don't have anything else, Your [81] Honor. Thank you.

THE COURT: Any redirect?

MS. BRAMBL: Just about three questions, Your Honor.

REDIRECT EXAMINATION

BY MS. BRAMBL:

Q. How many years did you spend living in the Douglas area?

A. Oh, about four years.

Q. And on all of the roads that you traveled, Leslie Canyon, the Rucker Canyon portion, and Kuykendall Cutoff, would you have felt safe driving just a regular,

nonfour-wheel-drive, low clearance vehicle on those roads?

A. Very safe.

Q. Would any of them, in your opinion, have been too rough to drive on—

A. No.

Q. —with a vehicle like that?

A. No.

Q. And the photographs that you took, did they fairly depict the road conditions—I guess my question is: Were there any parts that were really rough that you just didn't take pictures of, or did you try to make a representative showing of what the road looked like?

A. Yes, the photographs I took were of the roughest areas that I found.

MS. BRAMBL: That's all the questions I have.

[82]

THE COURT: Thank you.

Any recross?

MS. CABANILLAS: No, Your Honor. Thank you.

THE COURT: Thank you, sir. You may step down.

Any rebuttal witnesses?

You have another witness?

MS. BRAMBL: I have two more witnesses, Your Honor. I notice the hour.

THE COURT: Yes. I'm sorry. I thought that you were only calling Mr. Chacon. We have to recess at this time. I've got a meeting at 12:00. It is four minutes to 12:00. What we will do is we will reconvene at 1:45. I have a hearing at 3:00, but we will start up again at 1:45. I have a 1:15. We can reconvene at 1:30. We will reconvene at 1:30. We stand at recess until 1:30.

(A recess was taken.)

MS. BRAMBL: Ralph Arvizu.

RALPH ARVIZU, DEFENDANT, SWORN

THE CLERK: Please state your name and spell the last for the record.

THE WITNESS: Ralph R. Arvizu, A-r-v-i-z-u.

DIRECT EXAMINATION

BY MS. BRAMBL:

Q. Of what country are you a citizen?

A. U.S.

[83]

Q. Where do you live?

A. Douglas, Arizona.

Q. How long have you lived there?

A. Basically all my life except for ten years in Phoenix.

Q. And what kind of work do you do?

A. I'm a driver for Animal Health Care Center.

Q. And how long have you been in that occupation?

A. For a year, about a year.

Q. Before that what kind of work did you do?

A. I used to spray pot epoxy in Phoenix, Arizona for about four or five years.

Q. Are you married?

A. Yes.

Q. Do you have children?

A. Four.

Q. How old are they?

A. They are 10, 9, 5, about there, and one is going to be one year.

Q. Did you and your family own a van?

A. Yes.

Q. Earlier this year?

A. Yes, I did.

Q. Can you just briefly tell me the make and model?

A. A 1984 Toyota van, gray.

Q. And how many doors did it have and where were the windows [84] located?

A. Two doors basically, it had windows all over, and had a sliding door on the right for the rest of the passengers to get on, and a door in the back to lift.

Q. And, of course, we are going to be talking about the day of January 19 of this year when you were stopped and arrested by border patrol. How well do you remember the events of that day?

A. Pretty well.

Q. Who was driving the van?

A. I was.

Q. And were you on Leslie Canyon Road?

A. I was on Leslie Canyon Road going north.

Q. From there can you tell me what route you took?

A. I took—after passing Leslie Canyon Road, I took Rucker Canyon Read heading west and proceeded to go to Kuykendall Road north. It is very difficult to pronounce.

Q. Who else was in your car?

A. My sister Julie Arvizu and my nephews, Julisa, Renato, and Guillermo.

Q. And earlier that day had you made some stop in the national forest?

A. We did one stop prior to getting onto Rucker Canyon Road, we were still on Leslie Canyon, just to stretch out for a little while, five minutes. It was

maybe about—I'd say [85] about a mile or two away from Rucker Canyon Road and proceeded on.

Q. And you've had a chance to look at the map—

MS. BRAMBL: May I approach?

THE COURT: Yes, you may.

BY MS. BRAMBL:

Q. —that was marked and admitted as Exhibit 1. You heard the testimony about the route. Would you agree with what you have heard so far about the way your car was traveling, what direction?

A. Yes.

Q. How fast were you going around the time that you saw the border patrol agent?

A. About 20 to 30 miles an hour.

Q. Did you slow down abruptly when you saw him?

A. No, I didn't.

Q. How did you react when you first noticed the border patrol agent?

A. I knew he was there. I was nice and calm. I just was more relaxed, sat towards the steering wheel, and just kept going.

Q. Did you wave at him?

A. I acknowledged he was there. I looked at him, but, no, I did not wave at him.

Q. And do you know whether or not any of the passengers in [86] the car either looked at the agent or waved at him?

A. No, I don't.

Q. Do you recall when you were about to turn from Rucker Canyon onto Kuykendall Road whether or not you used your indicator?

A. Yes.

Q. What do you remember about that?

A. I turned them on when I got real close to the road, maybe about 100 feet, maybe even less, and turned them on and just kept going, did a slight stop just to make sure nobody was coming towards my way on that road I was going to turn on.

Q. So did your car come all the way to a stop, or did you just hesitate and look?

A. Just hesitate and look.

Q. Do you recall whether or not you turned your indicator off at any point during the turn?

A. No.

Q. Was there any noticeable odor of marijuana inside the van?

A. No, there wasn't.

Q. How long after your turn onto Kuykendall Road were you pulled over by border patrol?

A. About a mile or two.

Q. And tell me what happened.

A. When he turned on his lights, I stopped to the side and I [87] waited for him to come up to the window, rolled down the window and I said, "How are you doing?" He asked if I was a U.S. citizen—or everybody in the car was a U.S. citizen. I proceeded to tell him that everybody was a U.S. citizen. And when he was approaching the vehicle, he did have his hand on the gun, his right hand.

Q. Did he take the gun out?

A. No. He just had it near the gun.

Q. Was it on the gun, touching it, or near it?

A. Yes, on the gun. And he—he finished asking me if I was a U.S. citizen. I asked him if he needed any identification, which I was already taking out the identification to show him. He said no. He asked me to take a look around the vehicle. I said okay.

Q. What did you—tell me exactly what he asked.

A. If he could take a look around the vehicle.

Q. What did you understand that to mean?

A. Take a look around the vehicle.

Q. Did you think he would be looking inside?

A. No.

Q. And what happened then?

A. After that he proceeded to go around the front of the vehicle and just looked at everybody and asked me —as he poked his face in by the window, the window was closed, and he just looked in there and he said, "Can you open the door?" I [88] said, "The door doesn't open. It's broken."

So he proceeded to open it himself and opened the door and just looked at everybody and started looking at the bags and started feeling the bags. And once he felt one of the bags he said—he asked me—from right there he asked me—from where he was at he said, "What do you have in there?" I said, "I don't know."

So he went over—before he went over to the front, he asked me to get off the car. And I did get off. And I was going to the front and he goes, "No, go that way." He made me go to the passenger end of the vehicle and he asked me again, "What do you have in the car?" And I said, "I don't know."

So he told me to get down on the floor. I got down on the floor. He handcuffed me. And he went back to check on the bag. He opened one bag up because—I can see his steps as he was going. I can see since I was on the floor. I can see his steps going towards the door and I could just hear the zipper and everything.

And he came back again and said, "Tell me what you have in the car and everything will go real good on you." I said, "I don't know." After that he transferred me into his vehicle—no, no. Sorry. He read me my rights and he asked me if I wanted them in Spanish or English and I said English. Then that is when he transferred me to his vehicle.

Q. At any point did he tell you that you didn't have to let [89] him look inside your car?

A. No, no.

Q. That you could refuse to give consent?

A. No.

Q. And he didn't read you your Miranda warnings before asking to look inside?

A. No.

Q. You said that he had his hand touching his gun when he—

A. Yes.

Q. Asking you whether he could look around. How sure of that are you?

A. Very sure.

Q. Did his hand—throughout that first encounter did his hand remain at his side on the gun?

A. I heard a click on the button and he did just keep it in his holster, but it was unclicked and his hand was positioned in there. He just with his left hand told me to throw myself on this floor which I did.

Q. His hand stayed that way while he was talking to you?

A. Yes.

Q. Did he ever draw his gun, take it out of the holster?

A. No, I don't think he did. I was very nervous at that time so I just listened to what he said.

Q. And you've had a chance before court to look at the photographs that we marked and entered as exhibits? [90]

A. Yes.

Q. Just a couple quick questions about the road conditions.

First of all, the photographs that show the part of the road that you were on, Leslie Canyon, Rucker Canyon, and Kuykendall, did the road when you were on it look the same or different than as it appeared in the photos?

A. They are about the same.

Q. And was there any part of the road that you were driving on that you felt would not have been safe for the van that you were driving to be on?

A. At the speed I was going, it was good. They were good.

MS. BRAMBL: That is all the questions I have.

THE COURT: Ms. Cabanillas.

CROSS-EXAMINATION

BY MS. CABANILLAS:

Q. Mr. Arvizu, you stated on direct that you lived there in Douglas all your life. Is that right?

A. Basically all my life except for ten years in Phoenix.

Q. And that you were driving a 1984 minivan on this date, January 19?

A. Yes.

Q. And that you were traveling basically the exact route that the agent, Agent Stoddard, said you were traveling?

A. Yes.

Q. You were here in the courtroom when Agent Stoddard [91] testified. Is that correct?

A. Yes.

Q. You went up Leslie Canyon and then you hung that left turn on Rucker and hung the right turn on Kuykendall. Is that right?

A. Yes.

Q. So are you denying today that you had anything to do with those drugs that were found in your vehicle?

MS. BRAMBL: Objection. That is outside the scope of the purpose of this hearing.

THE COURT: Sustained.

MS. CABANILLAS: Your Honor, on that point I believe it goes to the credibility of this particular defendant.

THE COURT: Sustained.

BY MS. CABANILLAS:

Q. You stated that there was no noticeable odor of marijuana in the interior of the vehicle. Is that correct?

A. Yes.

Q. When the agent said there was an odor, you would differ on that point?

A. Yes.

Q. When the agent walked up to you and talked to you initially, where were you? What were you doing?

A. When he talked to me, when he walked up, I was on the passenger side—I mean on the driver's side.
[92]
Q. When you were on the driver's side, are you seated in your car?

A. Yes.

Q. You are—then is your door opened or closed?

A. Closed.

Q. The door was closed?

A. Yes. I didn't open no window until he got there.

Q. And when you did open the window—when he did approach your window, did you open your window?

A. Yes.

Q. You stated that the agent walked around—let me clarify. The agent spoke to you and then he asked you for consent to search the car?

A. To take a look around the vehicle.

Q. You stated that you did not then give him consent to look around or look in the car?

A. To look in, no. He came in himself.

Q. And when the agent then—when you are saying that he then walked around to the passenger side, is that what happened after that exchange?

A. No.

Q. What did he do?

A. He automatically told me to open the door on the side and I told him, "It doesn't work."

Q. Which door on the side are you referring to?
[93]
A. The sliding door.

Q. The sliding door, is that on the passenger side or the driver's side?

A. Passenger. He opened it.

Q. He opened it?

A. Yes.

Q. When he did that, did you say anything?

A. No.

Q. When he—there is part of the testimony—I believe I heard you on direct, you said that—the window on the passenger side, was that up or down?

A. They were up.

Q. Do you remember on direct that you stated that the officer poked his head in that window?

A. He didn't poke his head in there. He just was looking like that.

Q. So he never poked his head in the interior of the vehicle at all?

A. No.

Q. And when—I mean at all. That is, before he had that conversation with you relating to consent, he had not poked his head in the interior of the vehicle?

A. When I had my window rolled down, he was like this talking to me.

Q. So his head was outside the vehicle?
[94]
A. Yes.

Q. Is it your testimony then that you were out of the car and handcuffed before the officer discovered the marijuana?

A. I was on the floor, yes, and handcuffed.

Q. The duffel bag that contained the marijuana, is that your duffel bag?

A. No.

Q. So when you stated that you don't know what is in the duffel bag, whose duffel bag is it?

MS. BRAMBL: Object again on the ground of relevance and scope of the examination.

THE COURT: No, overruled, to explain the answer he gave earlier.

BY MS. CABANILLAS:

Q. The duffel bag you are referring to that contained the marijuana, whose duffel bag was that?

A. Whoever had loaded it on. I wouldn't know whose actually it was.

Q. So when you took control of this minivan, where did you take control of it?

MS. BRAMBL: Object again, Your Honor. This exceeds the scope of direct and the scope of the hearing.

THE COURT: It does seem to go beyond where the direct went, Ms. Cabanillas. I don't know that that has any bearing on the stop in this case.
[95]

MS. CABANILLAS: It also has control and bearing on the issue of standing if the defendant is denying knowledge of the drugs as well as the car.

THE COURT: He's in the vehicle. He's got standing. He's the driver of the vehicle and the drugs are found in the vehicle. He has got standing.

MS. CABANILLAS: As far as the actual drugs himself, if he is disavowing knowledge of the drugs, Your Honor. I would disagree on that point if I can explore it.

MS. BRAMBL: Your Honor, whether he knew the drugs were there or not is not what this hearing is about. That is the trial. It seems like those issues should be addressed then.

THE COURT: I don't think we need any testimony regarding standing. I think clearly if he is driving it and he gets stopped he has standing to object to the stop of the vehicle.

BY MS. CABANILLAS:

Q. As far as the duffel bag that was in your vehicle —where did you say you were going that day, what you were doing in the 1984 minivan?

A. I was going to Turkey Creek.

Q. What were you going to be doing in Turkey Creek?

A. Going to meet up with a gentleman.

Q. Who was this gentleman?

[96]

MS. BRAMBL: I would object again, Your Honor.

THE COURT: Overruled. It has to do with why he was out there.

BY MS. CABANILLAS:

Q. Who was the gentleman?

A. I don't personally know him. I was just supposed to meet a person in a Ford toolbox pickup. I was supposed to meet there.

Q. What was that about the toolbox?

A. Black toolbox is the description he gave me.

Q. You were going to meet this guy who you didn't know in the middle of Turkey Creek?

A. Didn't know.

Q. Do you recall when you were first placed on pretrial release in this case? Do you remember that? You were in custody and then put on pretrial release. Do you remember that?

A. Yes.

Q. And as part of your conditions of pretrial release, wasn't it true you weren't supposed to take any illegal drugs?

A. Yes.

Q. And isn't it true that—

MS. BRAMBL: Your Honor, excuse me. I object to the question that is about to be asked, which is whether or not he used any illegal drugs while he was on pretrial release. I [97] don't think that is relevant. It is certainly not any of the enumerated impeachment grounds. There is nothing to indicate that he was using any kind of illegal drugs on the date in question.

THE COURT: Well, if he violated a court order, doesn't that go to his credibility?

MS. CABANILLAS: That is the reason it is being offered.

THE COURT: Ms. Brambl.

MS. BRAMBL: I agree. It is improper impeachment and I still object.

THE COURT: Overruled.

BY MS. CABANILLAS:

Q. So when you were placed on pretrial release, didn't you promise the court you wouldn't use any illegal drugs while you were on pretrial release?

A. Yes.

Q. Isn't it true that you did use illegal drugs?

A. Yes.

Q. Didn't you take an avowal in front of the court today that you were going to tell the truth on everything?

A. Yes.

MS. CABANILLAS: I don't have anything else, Your Honor.

THE COURT: Any redirect?

[98] MS. BRAMBL: Just a question or two.

REDIRECT EXAMINATION

BY MS. BRAMBL:

Q. Have you told the truth today?

A. Yes.

Q. The oath that you took, what did it mean to you?

A. To tell the truth.

Q. Did you ever deny to pretrial services—

A. No.

Q. —or anyone—

A. No, I didn't.

Q. Out of all of the things that you have testified about today, how sure are you?

A. Very sure.

MS. BRAMBL: That is all the questions I have.

THE COURT: Thank you. You may step down, sir. Call your next witness.

MS. BRAMBL: Julie Reyes. May I get her from the hallway?

JULIE REYES, DEFENSE WITNESS, SWORN

THE CLERK: Please state your full name and spell the last for the record.

THE WITNESS: My name is Julie Reyes. R-e-y-e-s.

[99]

DIRECT EXAMINATION

BY MS. BRAMBL:

Q. What country are you a citizen?

A. Douglas, Arizona.

Q. That is where you were born?

A. Yes, ma'am.

Q. And how are you related to Ralph?

A. He's my brother.

Q. And where do you live?

A. In Tucson, Arizona.

Q. Do you have children?

A. Yes, five.

Q. How old are they?

A. I have two girls, 12 and 10, and I have three boys, 7 and two years old, twins.

Q. And about how often do you see Ralph and his family on average?

A. Once or twice a year.

Q. How was it that you came to be a passenger in the van that Ralph was driving earlier in January?

A. I needed a ride to Tucson because my car didn't start. So I was at my mom's house and he came in and my mom had told him that my car didn't start.

Q. So he offered you a ride?

A. Yes.

[100]

Q. And that was from Douglas to Tucson?

A. Yes, ma'am.

Q. And where were you sitting in the van?

A. On the passenger side.

Q. And who was driving?

A. Ralph.

Q. And where were the kids?

A. In back.

Q. Were all of your kids with you or just some of them?

A. Some of them.

Q. And did you notice anything unusual about the way your children were sitting in the car or in the van?

A. No, because I was—I went to go get my purse. My brother helped me with my bags. He put them inside the car. What happened, I came out, and when I came outside, he had shut the door and I went in front.

Q. And I want to turn to just the stretch of road that you were on starting at Leslie Canyon and up to Rucker Canyon and the turn on Kuykendall Road right before border patrol stopped the car.

Can you tell us what the road conditions were like? How did the road seem? Was it very bumpy or average?

A. It was average. It was a dirt road.

Q. Did this seem like a dangerous road to you?

A. No.

[101]

Q. Were you worried about the van being on a road like that?

A. No.

Q. Was there ever a point in time where Ralph hit the brakes and slowed down a great deal from the speed he was traveling?

A. No.

Q. Do you know about how fast Ralph was traveling?

A. Less than 30.

Q. Did you notice the border patrol agent before he pulled you over?

A. Yes. When we were coming, he was coming too in front of us, and he went to the side and then it was when we went and then we passed.

Q. Did you notice any change in Ralph or anyone else in the car, the way they were acting, after they saw the border patrol agent?

A. No, I didn't.

Q. Did you wave or look at the agent?

A. No.

Q. Tell us what happened when the agent pulled Ralph over?

A. Okay. He asked Ralph if we were U.S. citizens. He said yes.

Q. Let me back up. Where did the agent go to ask that?

A. When he stopped—when he turned and he stopped us, like a few minutes in front more.

Q. Which side of the car did he go up to, your side or [102] Ralph's side?

A. Ralph's side. It was on Ralph's side.

Q. You said he asked if you were U.S. citizens. Who answered?

A. My brother.

Q. What did you guys tell him?

A. Yes, we were all U.S. citizens.

Q. And what happened after that?

A. He asked us if—he asked Ralph if he could look around. Ralph said yes.

Q. And what happened after that?

A. He went around and my brother said that it didn't open and then he opened the door and he asked my kids if they were U.S. citizens and they said yes. He took off a bag from the back and he asked Ralph what he had in there and my brother said, "Take a look." Then when

he told me—he told me and my brother, "Hands up. Don't move." He had his hands on his waist and then he gave a turn and that is when he handcuffed Ralph.

Q. You said his hands were on his waist. Did you see whether or not his hand was near or on his gun?

A. It looked like he was touching it.

Q. Did you see whether or not his hand was touching his gun when he went up to Ralph's window?

A. When he went back?
[103]
Q. When he first came up to the car, could you see?

A. No, I couldn't see that.

Q. So only when he walked around the other side you could see?

A. Yes.

Q. Was there an odor of marijuana inside the van while you were there?

A. I didn't smell none.

MS. BRAMBL: That is all the questions I have.

THE COURT: Ms. Cabanillas.

CROSS-EXAMINATION

BY MS. CABANILLAS:

Q. You stated that you are the defendant's sister. Is that right?

A. Yes, ma'am.

Q. Do you care about him a lot?

A. Well, he's my brother.

Q. Probably wouldn't like to see him get in trouble. Would you agree with that?

A. Well, if—I care for him, let me tell you that. That is true.

Q. I understand. You stated that the children that were in the car were your children?

A. Yes, ma'am.

Q. How old were they?
[104]
A. 12, 10 and 7.

Q. 12, 10 and 7?

A. Uh-huh.

Q. The two children that were in the back whose feet were on top of the black duffel bag that had marijuana in it, which children were those?

A. I don't know.

Q. You don't remember?

A. No, because I'm not the one that shut the door. My brother was the one.

Q. Your brother shut the door. You stated that he was the one who, did you say, brought your luggage into the car? Is that right?

A. My bags.

Q. Your bags. Was the black duffel bag a bag that you knew about?

A. No.

Q. So where did that come from?

A. I don't know.

MS. BRAMBL: Object, Your Honor. It has just been asked and answered that she didn't know.

THE COURT: Overruled.

BY MS. CABANILLAS:

Q. Where did that black duffel bag come from?

A. I don't know. I didn't see no bag. My brother took the [105] bags in.

Q. So if—

A. He helped me put the bag in.

Q. If you don't know anything about the black duffel bag, was it the children's duffel bag?

A. I didn't see nothing.

Q. So if there is anybody that knows anything about that duffel bag, would it be your brother then?

A. I don't know. I can't say because I didn't see nothing.

Q. You stated that your brother was—you say he was giving you a ride from Douglas to Tucson. Is that right?

A. Yes.

Q. Where were you going in Tucson?

A. To my house.

Q. To your house. Isn't 191 the highway that leads from Douglas to I-10 which will then shoot you right up to Tucson?

A. Well—

Q. Is that true? Doesn't that route take you to Tucson, paved roads the whole way, I-91 straight up?

A. I don't know.

Q. You don't know. Have you lived in Douglas for a while?

A. Yes.

Q. How long?

A. Since I was born until I was like 23.

Q. So 23 years you lived in Douglas and you are just not [106] real sure about whether or not 191 leads to I-10 to take you to Tucson, quickest route?

A. No.

Q. Not sure?

A. The only thing I know is that Bisbee and other places, but my thing was that I didn't want my kids to miss school and I had a ride and I went with him.

Q. I notice that you said the agent appeared to be touching his gun. Where were you sitting?

A. I was on the passenger side.

Q. And when you say the agent appeared to be touching his gun, where was that, when the agent was on the driver's side?

A. No, when he was on my side.

Q. So when he was on your side, that was after the time that he had spoken to Ralph. Isn't that right?

A. Well, it was when he got the bag down and then it was when he went around.

Q. So when he went around to the side where you are at, that is when you saw that he may have had his hand on his gun. Is that what you said?

A. I saw him with his hand on his waist.

Q. On his waist, but you don't know whether it was on the gun or not?

A. Well, that is when he said, "Don't move. Stay still."

Q. When he said, "Don't move. Stay still," was that after [107] he found all the marijuana in the duffel bag?

A. Well, he didn't open it. He asked Ralph and then he went to Ralph and then he handcuffed Ralph and that is what happened.

Q. So is it your testimony then that Ralph was handcuffed before the agent found the marijuana?

A. Well, he didn't open the bag in that time.

Q. You are testifying he didn't open the bag of marijuana, the duffel bag that contained the marijuana?

A. Until he came back.

Q. When you are sitting on the passenger side and you stated that you saw Agent Stoddard talk to your brother, that was when Agent Stoddard was on the driver's side. Isn't that right?

A. What is that?

Q. Sure. I will repeat that.

When you are in the passenger seat and you are seated in the passenger seat, I think you testified that you noticed how the agent walked up to Ralph, your brother, and asked him a few questions initially. Do you remember that?

A. What do you mean?

Q. That is okay. Right after the stop, when the car was stopped, you are in the passenger seat, and do you see the agent walk up to your brother after the stop?

A. Yes, he did.
[108]
Q. Agent is talking to your brother?

A. Uh-huh.

Q. And can you see the agent at all from where you are standing—from where you are sitting, excuse me, when you are seated in the passenger seat?

A. Just his face.

Q. It's been about, let's see, February, March, April, May, June, July, August. I notice that you stated that you knew precisely what the agent stated, what you believed he asked, "Ralph, do you mind if I look around?" Do you remember that phase [*sic*]?

A. Uh-huh.

Q. Then you also noticed about the touching of the gun. Were you in the courtroom today when your brother testified? Were you in the courtroom just now when your brother testified?

A. Yes—no, not in here, no, outside.

Q. Have you spoken to your brother at all between the time of the stop and today? Have you had a chance to speak with him before you get up on the stand?

A. No.

Q. You haven't spoken to him at all about January to what is going on, almost a year, you haven't spoken to your brother once?

A. No.
[109]
Q. Not once. Not on the phone?

(Witness indicated.)

MS. CABANILLAS: I have nothing else. Thank you, Your Honor.

THE COURT: Any redirect?

MS. BRAMBL: Just a couple more.

REDIRECT EXAMINATION

BY MS. BRAMBL:

Q. Just to clarify the questions about what you saw, whether or not Agent Stoddard was touching his gun. You could not see anything but his face when he was on the driver's side of the car first talking to your brother, right? So you don't know whether he had his hand on the gun or not?

A. Uh-huh.

Q. When did you see him with his hand touching the gun?

A. It was when he went to the passenger side.

Q. To your side of the car?

A. Yes, ma'am.

Q. And how sure are you that his hand was actually touching the gun?

A. Because he had it on his waist. When he pulled it back, he put his hands on the waist and he said, "Don't move put your hands up," and, you know, I got scared

because, you know, when I heard that, and then for him to put his hand right there, so what is going on?
[110]

Q. When you say his hand was on his waist, was it just on his waist or also touching his gun? What do you remember on that?

A. It looked like half, half on his gun.

Q. So his hand was partly touching his gun?

A. Uh-huh.

Q. Did he ever take it out of the holster?

A. No, not that I remember.

Q. And you said that you haven't talked to your brother. Do you mean you haven't talked to him about the case or you haven't had any contact with him at all over the last—

MS. CABANILLAS: That has been asked and answered.

THE COURT: Overruled.

THE WITNESS: I haven't talked to him about this, but—

BY MS. BRAMBL

Q. Have you talked to him about other family things?

A. Well, yeah.

Q. So you have had contact with him since the arrest?

A. Yes, when we are at my mom's house.

Q. Would you tell lies for your brother?

A. No.

Q. Have you told the truth in court today?

A. Yes, ma'am, I have.

MS. BRAMBL: That is all the questions I have.
[111]

THE COURT: Thank you, ma'am. You may be excused.

Call your next witness.

MS. BRAMBL: We don't have anymore, Your Honor.

THE COURT: Does the government have any other witnesses?

MS. CABANILLAS: No, Your Honor. Thank you.

THE COURT: Counsel wish to argue?

MS. BRAMBL: Yes, Your Honor.

Your Honor, Agent Stoddard did not have a reasonable suspicion to stop. And the consent that was given, it was both involuntary and it was tainted by the illegal stop.

Just looking at the factors involved that we heard testimony about today, it sounds like a laundry list of factors, but when you look at each one, which I'm

about to do, there is really nothing to separate Mr. Arvizu and his vehicle from a law-abiding citizen.

Every one of the factors cited is basically—you couldn't separate it from innocent behavior. I will start with the driving.

There were two areas that were testified to. One was that when he first saw the agent that he slowed down by about half. The agent admitted that he really couldn't say how fast he was going either before or after that. This was a rural area. Just about all of the cases when you look at them, if no traffic laws were violated or no traffic [112] disturbance was created, that is pretty much not a factor that could be considered to support a stop. I think we have that situation here.

We don't have any testimony that he violated traffic laws, that he was driving dangerously, or causing problems for other drivers.

It is not the lane change but the turn that was the other driving indicated. He claims that—Agent Stoddard claims that Mr. Arvizu made an abrupt turn onto Kuykendall Road. However, the agent also claimed—and this is somewhat contradictory—that he had his indicator on for hundreds of yards beforehand, way too early.

As you heard from the testimony, that is somewhat disputed because Mr. Arvizu says that he had it on what he considered a normal amount of time. However, certainly Mr. Arvizu signaled ahead of time.

You saw and heard testimony both from the agent and Mr. Chacon the nature of the intersection. It is kind of a T. There was nothing abnormal or wrong with that driving.

Certainly, again, no dangerous driving or obstructing traffic. No traffic laws were violated. Agent Stoddard admitted he wasn't making a traffic stop or making a stop because of traffic.

The registration of the car turned out to Leticia Arvizu at 403 4th Street in Douglas. Both the name and [113] address were legitimate. There is nothing to show that either the registered owner or the address had ever before been involved in any kind of illegal activity. It didn't come up as a hit.

The only thing the agent can say is that that whole region is basically bad in Douglas, which certainly is not fair or is not appropriate for all the law-abiding citizens who would live there. Just because you live on a street in a neighborhood where things happen doesn't make you a lawbreaker.

The vehicle wasn't stolen. There were basically no problems with it. It had valid Arizona plates. So it is not like it had a Sonoran plate or a drive-out sticker or some indication that will sometimes cause agents to be suspicious.

The shift change and the checkpoint evasion claims I think are also unfounded. This was 45 minutes ahead of time from the shift change so I guess we are talking about three hours a day when it wouldn't be all right to be driving on the road because there are three shift changes.

And the agent also admitted that agents may drive back along Leslie Canyon Road so the argument doesn't make sense because, if they are heading back, they will be heading back from any direction. It is not like they follow a set route.

The same thing with the checkpoint evasion argument. [114] That is, they are presuming everyone that doesn't live there has no business to be on that road unless they are evading a checkpoint. We don't even have any testimony about how long that checkpoint had been active or whether or not people generally know that.

We've had a lot of testimony about all of the different residences and ranches along the area, Rucker Canyon, and everyone agreed it is a popular recreation spot. There are a lot of valid law-abiding reasons why a person could be on that road. It is not restricted in any way.

The fact that it was 2:45 on a weekend holiday afternoon is also—there is basically nothing about the time or location to create a reasonable suspicion.

The factors that have been listed about whether Ralph and the passenger looked nervous, whether they acknowledged or waved at him, it is almost as if people can't do anything right as far as border patrol is concerned.

Here we have the situation where the border patrol agent claims when the passenger and Mr. Arvizu didn't wave that is very unusual, that was something in the bad character. Yet when the children wave, he says that is bad too because that didn't look normal.

I think there are several cases where not looking at the agent, looking stiff or rigid, those kinds of things, are just not enough, even in combination with other factors, [115] unless you have something to take it out of the ordinary, to distinguish Mr. Arvizu from other people.

The fact that the children's knees were slightly elevated. This isn't a situation where their knees are real high up around their shoulders or chest level. He says they are basically about level with the seat. Certainly people who are picnicking or camp have items and there is nothing suspicious about that even in consort with the other factors.

The road—when you look at the photographs and you hear the testimony, all three of the roads that could be referred to in this case, Leslie Canyon, the stretch of Rucker Canyon, and Kuykendall Cutoff, the roads are good roads. They perhaps would be muddy in the event of rain, but they are certainly not four-wheel-drive-only roads. No testimony they had to have a four-wheel drive or restricted or that a four-wheel drive—there were not even any signs recommending it. They are rural, dirt roads, but certainly not unsafe or inappropriate to have a two-wheel-drive car on.

The other factor that was listed, the prior—or other experience of Agent Finley, that really doesn't have anything to do with this case at all. Agent Stoddard admitted that there is no connection between the van that was observed in this—in that instance with Agent Finley and the van in this case.

In fact, he believed that other van had been and its [116] occupants had been apprehended. So those incidents are completely unconnected. There was no testimony to show any nexus in time. We don't know whether this happened the week before Mr. Arvizu's arrest or two years before.

Certainly there is nothing to rely on. This factor would basically mean that all minivans on Leslie Canyon Road should be subjected to a stop.

The odor of marijuana that was mentioned, that is not even a factor. I believe that shouldn't be considered by the court, even if you believe that the agent did detect it, because through the agent's own testimony, he would not have detected that odor of marijuana until he entered the van which would have been after the stop and after the consent had been given.

There are a lot of things missing that you would expect to see in a case like this. There isn't much of a proximity to the border. That is 34 miles away. Basically there is just nothing to separate out Mr. Arvizu and the van from anyone else engaging in normal ordinary conduct. In short, no particularized suspicion that this car or driver was doing anything wrong.

I just wanted to comment on three cases. I think they have already been referred to in the motions.

One is *U.S. v. Hernandez-Alvarado*, 891 F.2d 1414. That was a case where there was not reasonable suspicion. The [117] Ninth Circuit found there the driver had slowed down noticeably when a police vehicle approached. His residence was in a neighborhood right on the Mexican border which was under investigation for narcotics activity. The car had a large trunk. Both the driver and passenger appeared nervous. The factor that wasn't involved here was the two-way antenna on the car.

The Ninth Circuit found that a combination of those factors was not enough to create a reasonable suspicion.

Another case where the Ninth Circuit did find reasonable suspicion was *U.S. v. Rodriguez-Sanchez*, 23 F.3d 1488. I think that case is distinguishable from this case because there, there was an abrupt lane change, but it actually involved dangerous driving that created a traffic hazard for other people. There the car abruptly exited the interstate.

It sounds like it was a busy California freeway and basically when it spotted whatever law enforcement behind it, it made an abrupt exit. It crossed two lanes of traffic without looking for other vehicles and it actually cut off two cars that were traveling in the other lanes. Basically it made a very fast and dangerous maneuver across two lanes of traffic to leave the interstate, and certainly nothing like that happened here.

In fact, that case characterized the driving as an [118] evasive maneuver. Here Ralph was actually signalling too much, if you believe the agent's testimony that he was signalling for hundreds of yards. So the opposite of evasive.

Then I would also compare *U.S. v. Robert L.*, 874 5 F.2d 701. The Ninth Circuit found no reasonable suspicion. There the driver wouldn't make eye contact with the law enforcement officer. He swerved to avoid the officer into another lane but without traffic. He was driving in tandem with another car and his vehicle contained a large trunk.

Here we have Mr. Arvizu driving; certainly in a rural area, but it is certainly not in the middle of nowhere with no reason to be there. There is a national monument close by, ranches, houses, picnic areas, and

in fact he was very close to the Rucker Canyon Road turnoff.

As I pointed out before, this was a weekend at 2:15 in the afternoon.

Turning briefly to the consent issues, I almost think with the bad stop that we don't have to reach those. But I think there are two reasons why any consent given was invalid.

That would be—the first would be that the consent was involuntary and I would look to *Chon-Jimenez*. I didn't write down the cite. I think it is in the motion that I filed.

That case looks at five factors. I think that, and [119] there is no magic number. I think the court has to weigh those. I think that out of the five factors that we have four of them and that therefore the consent was involuntary.

Whether or not he was in custody, certainly any reasonable person in Mr. Arvizu's shoes would not have felt free to leave. I think it was clear that he was being detained and was in custody.

Whether or not the weapon was drawn, this is a factor in dispute. No one says the weapon was drawn. But he did have—the agent had his hand on the gun. The agent actually doesn't remember, if I am remembering his testimony correctly. He stated normal practice would not be to either unholster his gun or touch it, but he didn't recall whether he had done those things in this case.

You just have to look at the testimony of Mr. Arvizu and his sister. Their testimony seemed well remembered and believable. Mr. Arvizu stated that

when the agent first approached him he had his hand on the gun and that he vividly remembered hearing the button click so the agent would have it accessible.

Julie Reyes testified she didn't see it at first at the other side of the car, a factor which bolsters her credibility because she could only see the agent's face through the window. When he did walk around, she saw his hand on his waist touching his gun. So I think that factor is [120] satisfied.

I think it is undisputed that he was not read his Miranda warnings before being asked whether or not they could look inside the vehicle. And he was—again, it is undisputed he was not informed of his right to consent—of his right to refuse consent to search.

So those last two factors I think would have to be undisputed.

The final factor, I would concede, does not apply, in that there is no evidence that he was told that if he didn't consent a search warrant would be obtained.

I think when you look at and weigh all of those factors that the consent, if it was given, was involuntary.

I would also note that the question and the answer were not clear, but there is certainly evidence that even if Mr. Arvizu gave some sort of consent that he thought he was consenting to just a search around the vehicle and not inside it.

Finally, any consent given would also be tainted by the prior illegal stop. There is four factors that are looked at there. I don't think—I think I cited the case in my motion.

The four factors there are Miranda, temporal proximity, intervening circumstances, and the purpose and flagrancy of the misconduct. I think we satisfy all four of those [121] conditions that the consent would be tainted by the prior illegal stop.

Mr. Arvizu was not Mirandized before giving consent.

As far as temporal proximity of the arrest and consent, one occurred immediately after the other so there is no gap. There is certainly no intervening circumstances.

And the stop appears to have been clearly illegal and not based on reasonable suspicion.

For all these reasons, Your Honor, I'm asking that you suppress the marijuana in this case.

THE COURT: Thank you.

Ms. Cabanillas.

MS. CABANILLAS: Thank you, Your Honor.

The first thing—the hurdle the court needs to get past would be a question of who to believe.

Agent Stoddard testified this morning and then we heard from Mr. Chacon, which I believe his testimony basically. I mean, Ms. Brambl mentioned the things that shows the significance of his testimony, which is basically setting forth the landscape and stuff like that.

If you compare Agent Stoddard with the defendant and his sister, I would submit to you that the court really has no conclusion other than Agent

Stoddard—where they conflict Agent Stoddard should be believed.

Ms. Brambl stated that the sister's—or the [122] defendant's testimony was well remembered. I submit to you it was well rehearsed.

The sister, as Your Honor saw a few minutes ago, when I asked her on cross-examination "Have you ever spoken to the defendant, not even over the last year, not even a phone call?" and she says, "No, no, no," and then when Ms. Brambl gets up, the friendly face representing her brother, then we hear that she not only has spoken to him but she—her brother, but she has also been with the family and all this sort of stuff.

What that boils down to that she is not to be believed and she corroborates what the defendant says happened here. Then really what the defendant says happened here didn't happen. Especially when it comes to those conflicting statements about consent. That is when I think the credibility issue really comes to bear.

Starting then with the proposition that Agent Stoddard's testimony was the credible testimony in front of Your Honor, there is enough to show reasonable suspicion to stop.

I would also note for the record, though, that I would submit the defendant has no standing to challenge the search of the duffel bag. Whether or not he has standing to challenge the stop of the vehicle as a nonowner driver, I will leave that to Your Honor.

[123]

But to the bag he disavowed knowledge. His sister disavowed knowledge. I submit to you in order to be able to challenge the search of an item, you have to

have an expectation of privacy in the item, and nothing the defendant stated demonstrated, and it is his burden to demonstrate, that he has standing.

Then I would submit the marijuana is admissible because the defendant's disavowed knowledge of it and has no standing to challenge the acquisition of it.

Second, though, even if the court was to find the defendant had standing to search the bag—excuse me—to challenge the stop of the vehicle and search the bag, the first step, as Ms. Brambl has noted, is we have to have reasonable suspicion and the officer had to have reasonable suspicion to stop the car.

And I've cited some law in my pleadings I filed. I'm referring to my response to the motion to suppress evidence that was filed on September 11.

And the first thing to note of course is the requirement by the United States Supreme Court that all the factors be viewed together. I think it is real important to keep that in mind because Ms. Brambl was attacking each factor independently and trying to chuck out each factor why it shouldn't be relied upon or not a legitimate factor.

What we need to do is review the evidence in light [124] of the officer's experience and training, in the light of an experienced officer and through the eyes of an experienced officer. And when viewed that way the evidence is sufficient to establish that the officer had reasonable suspicion to stop this car.

The location is very important or significant. There are some factors that are cited in the government's pleadings and I won't belabor all of the factors. What I mean by that is the legal standards set forth on

page 5, looking at what is it about a vehicle or the area that can justify a stop.

We have got characteristics, proximity, patterns, and time of day, previous alien smuggling in the area, behavior of the drivers, appearance, and then model and appearance of the vehicle, and officer experience.

If you look at all that and add it up, the equation adds to reasonable suspicion.

The area in this case—and even Mr. Chacon conceded that it is a remote area. These roads are dirt roads. They are back roads. The quickest route—and, again, you have differing testimony here. I don't think Mr. Chacon conflicted with Agent Stoddard as much as just indicating he didn't know.

But the quickest route from Douglas to north, and if you go by what the defendant and sister say, between Douglas [125] to visit there or go home in Tucson, then the quickest route would be I-91. The unfortunate thing in transporting drugs would be there is a checkpoint at I-91 and Rucker Canyon.

Anybody who goes north from Douglas to the city, being Tucson, or any other city off I-10, they would have to pass through that checkpoint. That is what makes this significant is the fact that checkpoint is operational that day.

You heard Agent Stoddard testify that because the checkpoint is operational they have roving patrols in those back woods area that are normally used to circumvent the checkpoint.

You heard the agent testify the exact route this particular defendant took—and the defendant

himself agreed that he took this route—Leslie Canyon north, getting to Rucker Canyon, hanging that left. Again, the sensor activity corroborated the defendant's route of travel. And that if somebody was to circumvent the checkpoint, they would do exactly the route the defendant took in this case.

And that is a significant factor not undermined at all by the fact that the Coronado National Forest is to the east. The reason that is not undermined is because the second sensor indicated the car had come north, Leslie Canyon, and hung a left on Rucker Canyon, which was away from the forest.

The picnic areas you heard referred to are to Rucker [126] Canyon to the east and that is not the direction of the car.

Again, all of these are pretty fact specific. In this particular circumstance, it was evident that the vehicle had not come from the national forest. The Hunt Canyon Road that is down south there, the testimony was that that is not a picnic ground type place.

So, again, you have the defendant saying he went Leslie Canyon north and the agent saying that and that is confirmed. What made this significant again is the fact the defendant takes that turn on Kuykendall and that is the route that somebody would take to successfully circumvent the checkpoint.

I-181 I believe that is running east to west on Turkey Creek. As I am referring, I am looking at government's Exhibit 40. It is either 40 or 41, whichever is the 8 1/2 by 11.

As you can see, the Kuykendall Cutoff Road would then take somebody successfully past the checkpoint that is operational on I-191 and Rucker Canyon.

I submit to you that the agent is entitled to rely on his knowledge of that area. There has been prior apprehensions in that area. Agent Finley's information given to Agent Stoddard. The fact that he may or may not have made the apprehension of that vehicle doesn't undermine the fact that that confirms that minivans are used to transport drugs [127] and also that that confirms the fact that that area is indeed used as a route to circumvent checkpoints or to at least take a route up and is used by drug dealers.

The factors then which the agent saw when he started going on Rucker Canyon Road. We have the timing of the sensor activity, and the agent is able to say that—based on his knowledge of the area and the timing, he was able to say this vehicle that he saw was indeed the one that tripped the sensors. That is significant. I have cited case law about that.

The agent—the defense makes it sound like this is some rollicking playground and a bunch of people biking and traveling around. The bottom line: the agent said he has to wait for hours before a car goes by, even though there may be ranchers in the area. That is the kind of area it is. It is remote. There isn't a lot of activity. And that is the reason that sensor activity is so significant.

When the agent saw the car come toward him, it slowed down, reduced its speed dramatically, in half.

Again, any differing on any of these facts as I present them, or Agent Stoddard testified to, more im-

portantly, I would submit to you the agent is more credible than the defendant and his sister.

The car decreased dramatically his speed in half. A severe decrease in speed, again based on case law cited in the [128] pleadings, is a factor that can be considered.

These are all factors that can be considered and all together add up to reasonable suspicion. You just can't chuck one out and keep one and chuck the other out and keep the other. It has to be all viewed in totality.

The car decreases its speed. When the van passes by, the driver gets really rigid and stares forward. I recognize the law of the Ninth Circuit saying failure to look or looking is not a factor of reasonable suspicion analysis. I submit that is fine. Without it there is ample reasonable suspicion. But I do believe that it is a legitimate factor to consider, the defendant's demeanor.

If his demeanor is where he gets rigid and seems nervous, that is a legitimate factor, and the agent was proper—or acted properly in relying upon it.

He saw the children in the very back. Their feet were up on something. The agent acted out on the stand exactly where sort of the kids' feet were. It looked as if the feet were in the passenger—or in the foot rest area, but they couldn't put their feet down like somebody—like there was something there.

That was corroborated obviously at the very end when the officer discovered the marijuana and the duffel bag was sitting there right underneath the children. I recognize that post-stop facts are not going to be considered into a pre-stop [129] scenario, but it

does confirm and corroborate at least the credibility of this agent when he stated that he saw the children's feet on something.

After the agent saw the children's feet, then he starts to follow the car. When he follows the car, he noticed the blinker go on by the defendant and then come off and then come on again and he takes this turn. I believe the agent described it as an abrupt turn. Erratic driving again is another factor. The agent can see. He was not stopped for a traffic violation. Still it is a legitimate factor. After, the agent followed the car on Rucker Canyon—excuse me—on Kuykendall Road.

Then we have the use of minivans on a dirt road and it is rugged terrain. Sure it is possible for a minivan to ride these roads. But is it common? Is it likely? Does it help with the reasonable suspicion analysis to note that sedans don't normally drive these roads?

Yes, it is significant, and I submit to you the fact that Kuykendall Road is not only the last route to circumvent the checkpoint but is also a rough road being driven by a minivan is also significant.

The agent ran the registration. The fact this came back to that location by Douglas, the agent had specific knowledge of that area being a high concentration area for illegal smuggling, that again heightened his suspicion.

[130]

Is this reasonable it all boils down to. Is it reasonable for the agent at that point, considering all the evidence, all the factors, to stop the car? I submit to you yes, it was lawful.

After that the agent walked up to the driver and I submit to you the consent that was—that the marijuana is admissible for several reasons. We have consent. And I submit again that when the agent says he asked, "May I search the car?" or whatever it is that the agent said on the stand, I think he said, "Can I look in your car to search it?" I think may have been what he said, the defendant said yes.

What you have also is how does this corroborate what the agent said. Well, the agent walks around and he opens up the door, or there may have been an interchange in there about can this door open, can it not. There was a question about that. But the consent was given when the agent spoke to the driver. I would submit to you that you go by what Agent Stoddard said and not by what the defendant said because, again, there is a credibility issue here.

The agent stated that he didn't have his hand on his gun during this exchange. Again, I submit to you that the defendant and his sister differing on that point is a question of credibility. Even if it was possible that he did, that would not undermine the consent because the consent can be freely given otherwise.

[131]

Defense stated that he was not told of his right to refuse consent. Well, there is a U.S. Supreme Court case, and I want to say it is *Pennsylvania* v. *Labron*, or *Maryland* v. *Wilson*, one of those two. I may file something on that point. You don't have to tell somebody about their right to consent. It also isn't required that Miranda be given before consent is given. Certainly that makes sense because he was only detained at that point and not arrested.

After the agent received consent, he opens the door and smells marijuana. At that point he can still go and find out marijuana on that consent, but, if not, he also has probable cause at that point because once he smells marijuana and the odor of marijuana, he has probable cause to search the vehicle and that would include all the containers in the vehicle.

I would also note that—I think there is a Ninth Circuit case called *U.S.* v. *Mines*, and that particular case the defendant—there was an issue about whether or not the agent had asked for permission to search the car, and the defendant made, very much like this defendant, an argument that he just consented to look in the car and not to search the car and the court noted that if the defendant just stood by while the agent looked in places and didn't say anything and didn't object that that is circumstantial evidence of the consent to enter the car.

[132]

If *Mines* does not stand for—if *Mines* factors are off on that point, I am thinking of a Division out of the Arizona Court of Appeals, *State* v. *Paredes*, out of Division(2). I think Judge Roll was the author of that opinion and I believe that that was relied upon—*U.S.* v. *Mines* was relied upon in order to defeat a similar argument raised by the defense.

The shift change, Your Honor, that occurred—or that was occurring at this time. The agent testified around 2:15, 2:30 they start heading back, and this was all cleared out. I forgot to add that to the reasonable suspicion analysis. He stated that they get a lot of stops during that time because the drug dealers have

lookouts and they look for the times the border patrol are going to be patrolling.

As far as the waving of the children, I would submit to you that was another odd factor that the officer was reasonable in taking into consideration with everything all together.

With that I don't have anything else, if you have any questions for me. I would just submit that and ask you to deny the motion.

THE COURT: Thank you.

Any rebuttal?

MS. BRAMBL: Briefly.

I would first point out that there aren't a whole [133] lot of differences between what Agent Stoddard and the other witnesses said. Even if you take everything that Agent Stoddard said and don't even look at the other testimony, there is still not enough for reasonable suspicion.

A lot of the things that the other witnesses testified to were on points that Agent Stoddard really didn't remember or make a note of the time and could only testify as to his habit.

I would suggest that the testimony of Mr. Arvizu and his sister on whether the agent had his hand on the gun is something they would probably clearly remember and Agent Stoddard would probably be less likely to invent something that happens as it must somewhat frequently.

And I would point out that the *Chon-Jimenez* case does say they specifically found that even though in that case the agent didn't have his gun drawn that

the hand on the gun was an implicitly coercive factor. And Julie Reyes remembers it because she was scared. She found that very frightening, as would a lot of people under those circumstances.

Regarding the standing, I would just point out that I believe my objection was sustained about whether Mr. Arvizu didn't avow or disavow knowledge of the marijuana, but that would be for some later proceeding. Clearly he has standing for the whole search.

I would also point out that Agent Stoddard in his [134] report, and I think on the stand too, pretty much admitted that he made the stop not because he thought there were illegal drugs in the car but to check for alien smuggling, something that there was certainly no reasonable suspicion to support. In fact, his first question was "What country are you a citizen of?" He received satisfactory answers.

The testimony from both Agent Stoddard and Mr. Arvizu indicated that he looked in the window while he was talking to Mr. Arvizu and could certainly see that there were no illegal aliens or other persons lying or hiding on the floor. So it is just another reason why this stop is not based on reasonable suspicion.

I would also point out that the sensor activity really meant nothing in and of itself because these weren't sensors designed to show activity around the border as are a lot of sensors. These were sensors to show activity in an area 30 miles from the border.

Finally, although there is no requirement that a person be notified they have a right to refuse to consent to a search, in other words it is not mandatory, but it is a factor set forth in *Chon-Jimenez* and other cases.

For all those reasons that I have previously stated, I would ask that you find that this was a stop not supported by reasonable suspicion.

* * * * *

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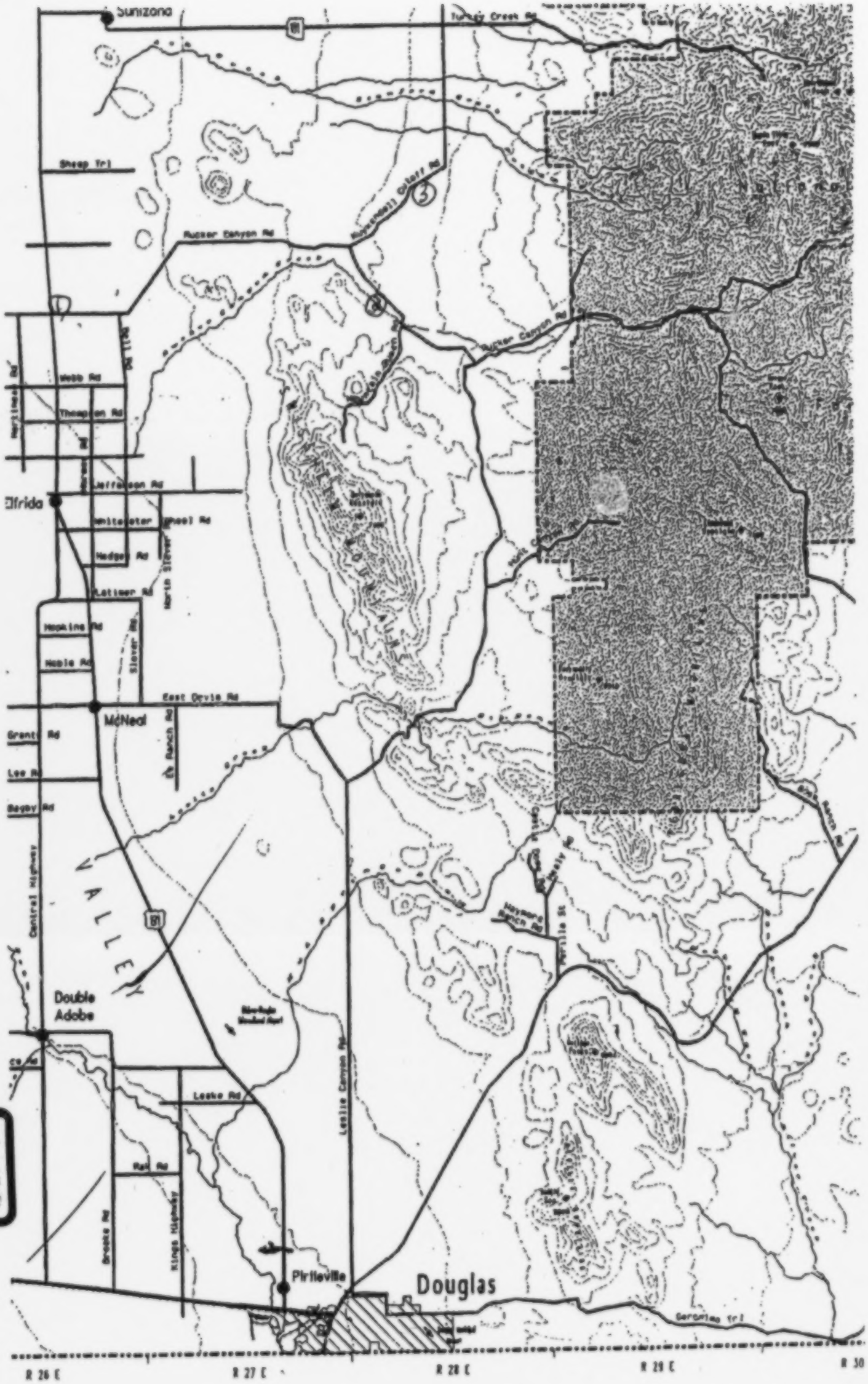
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East Doyle Rd
McNeal
Grant Rd
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Double Adobe
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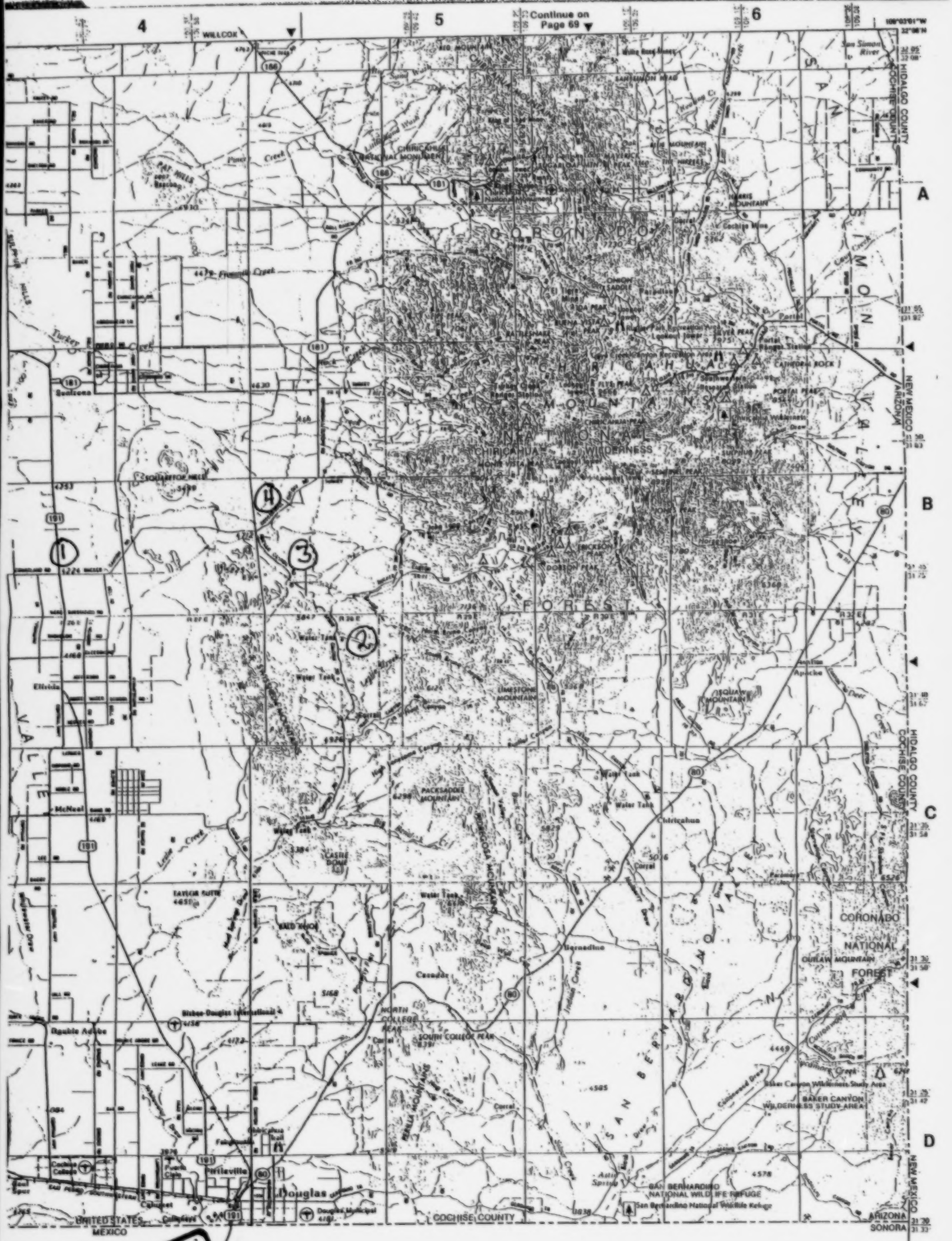
Leslie Canyon
Leslie Canyon Rd
Leslie Canyon Rd
Leslie Canyon Rd

Defense Exhibit 1A



LEGEND

MAP OF DOUGLAS, CHRIICAHUA MOUNTAIN AREA

Notations: The blue highlighted area depicts Mr. Arvizu's route of travel

#1 marks the Border Patrol Check-point at the intersection of Rucker Canyon Road and Highway 191.

#2 marks the approximate location of Border Patrol sensors.

#3 marks the approximate area where Mr. Arvizu's van passed Border Patrol Agent Stoddard's stationary vehicle.

#4 marks the approximate area where the Agent Stoddard stopped Mr. Arvizu's van.

17 20.4 miles from KCC Rd. on Leslie Canyon Rd.

4 adm
98-150

Exhibit 4:
Photograph of Leslie Canyon Road

Facing S.E @ Kuykendall and Rucker Canyon Rd

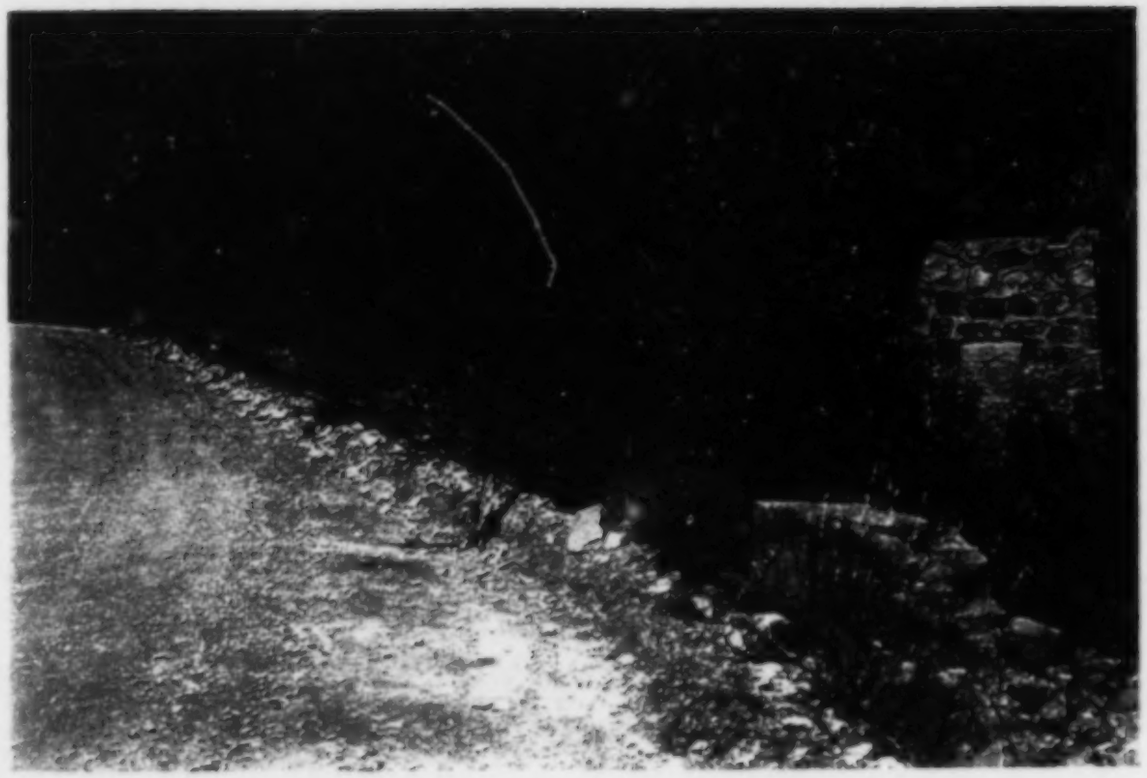
5adm
DR98-157

Exhibit 5:
Photograph of intersection of Kuykendall Cutoff Road and Rucker Canyon Road

C Road Character / Entire Run / Rucker Canyon Rd / Leslie Canyon Rd. @ 5.2 miles from Kenyon and old S.O. Rd.

Exhibit 6
Page 1 of 1
98-157

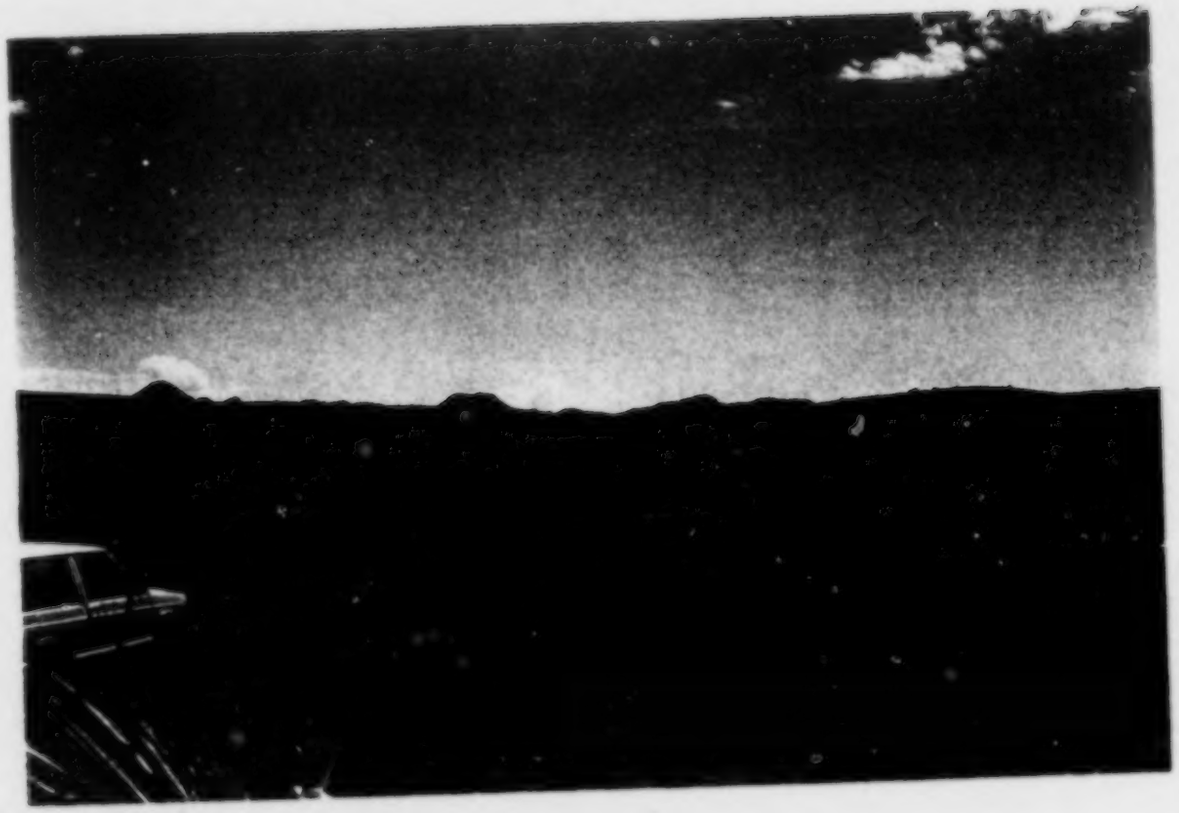
Exhibit 6:
Photograph of intersection of Rucker Canyon Road and Leslie Canyon Road



14 17.3 miles from Highway 1 via S.R.1 & Leslie Canyon Rd

ADM
CR98-157

Exhibit 7:
Photograph of Leslie Canyon Road



1) Road Character on Leslie Canyon Rd.
2 miles from Kuykendall C.D. Looking S.

Exhibit 8:
Photograph of Leslie Canyon Road

1 Road Character looking W@intersection
Leslie Canyon/Rucker Canyon Rd.

Exhibit 9:
Photograph of intersection of Leslie Canyon Road and Rucker Canyon Road

Kuykendall Rd

adm
19
AR98-157

5 ½ miles from Rock.

Exhibit 19:
Photograph of Kuykendall Cutoff Road

Turkey Creek & Kuykendall

ASM 21 2R98-159

Exhibit 21:
Photograph of Kuykendall Cutoff Road and Turkey Creek

Kuykendall Rd

adm
22
LR98-157

Exhibit 22:
Photograph of Kuykendall Cutoff R

Kuykendall & Rucker Canyon Rd

ADM 23 KR98-157

Exhibit 23:
Photograph of Kuykendall Road and Rucke Canyon Road

Kuykendall & Rucker
Canyon Rd

Exhibit 24:
Photograph of Kuykendall Road and Rucker Canyon Road

curve in Kuykendall

3 > miles

Adm 26 DE98157

Exhibit 26:
Photograph of Kuykendall Cutoff Road

Kuykendall Rd

Adm
27
ER98-157

Exhibit 27:
Photograph of Kuykendall Cutoff Road

Kuykendall

dam
32
RP98-157

Exhibit 32:
Photograph of Kuykendall Cutoff Road

Kuykendall

adm
33
DX98151

Exhibit 33:
Photograph of Kuykendall Cutoff